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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947.

No. 624

MATLAW CORPORATION,
Petitioner,

vs.

WAR DAMAGE CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

(BRIEF ANNEXED)

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

(BRIEF ANNEXED)

STATEMENT OF THE MATTER INVOLVED.

This is a representative class action by Petitioner-plaintiff to impress a resulting trust upon a residuary fund of about $225,000,000.00 in the hands of Respondent-defendant, War Damage Corporation, for the common pro-rata benefit of more than 6,000,000 property owners throughout the nation who contributed the fund (R. 1-6). The District Court for the Southern District of Indiana dismissed the complaint for supposed lack of jurisdictional amount (R. 21, 26, 7 F. R. D 349), the Seventh Circuit Court of Appeals affirmed (R. 77, 83, 164 F. 2d 281), and plaintiff brings this petition.

Respondent-defendant is a subsidiary Government corporation which was chartered by Reconstruction Finance Corporation a few days after Pearl Harbor, as part of the war program, and as an instrumentality to furnish "reasonable protection" against war damage to property owners throughout the nation. Defendant is wholly owned by RFC. The gist of the complaint is that defendant issued war damage insurance policies, identical in form, to plaintiff and to more than 6,000,000 other property owners throughout the United States, as part of the war program, and collected from them a premium fund or pool of about $225,000,000.00 to be used to pay their expected war damage losses. The losses turned out to be very small. Out of this pool, defendant paid war damage losses of about $223,000.00, or about one thousandth part of the fund, leaving this residue of the fund, amounting to nearly $225,000,000.00, in defendant's hands when it got ready to liquidate at the close of the war. These 6,000,000 policyholders are the plaintiff class, and this residue in defendant's hands, after all of defendant's expenses and losses have been paid, is the fund sought to be impressed with the resulting trust in favor of this class as beneficiaries, pro-rata, in proportion to their premium contributions to the fund (R. 1-5).

Respondent-defendant has asserted the right and intention to turn this residue of the fund over to its parent, Reconstruction Finance Corporation, as a "stockholder's profit" to the latter. The RFC purchased and held all of defendant's issued capital stock in the amount of $1,000,000.00, and this would give RFC a profit of about 225 times its invest[illegible] 22,500%. Defendant has also asserted the alternati[illegible]tention in the courts below that this $225,000,000.0[illegible] fund remaining at the close of its operations is a "profit" which it made in the

insurance business and which it should turn over to the federal Treasury.

Petitioner-plaintiff's complaint asserts the opposing theory that this $225,000,000.00 residue of the pool is a resulting trust fund held by defendant for the common pro-rata benefit of all defendant's 6,000,000 policyholders who contributed the entire fund (except the RFC's initial $1,000,000.00 stock investment, which plaintiff concedes should be refunded to the RFC). The complaint bases this trust contention upon the intent of Congress in the statutes creating defendant, and upon the course of conduct by which defendant operated under the statutes and collected this vast pool of money. This trust contention is also grounded upon the basic equity doctrine that where a fund is contributed for a special purpose (in this case it was paid into this Government-sponsored pool for the purpose of paying the contributors' war damage losses), and the purpose is accomplished without exhausting the fund, a resulting trust is impressed on the residue in favor of the contributors, and the holder of the fund cannot divert it to a foreign purpose (such as defendant's intended payment of it into the RFC's treasury or into the federal Treasury for general Government use).

Respondent-defendant moved to dismiss the complaint in the District Court (for the Southern District of Indiana, Hon. Robert C. Baltzell) on two grounds: (1) Failure to state the jurisdictional amount of $3,000.00. The amount coming to plaintiff individually out of the fund is less than that amount, and this is true of the great majority of the class members, since few of them paid premiums as large as $3,000.00 into the fund. Defendant contended that the *nature* of the class and the class claim is such that the class members cannot aggre-

gate their interests in the fund for jurisdictional purposes. (2) If jurisdiction exists, the complaint fails to state a valid claim on the merits. Defendant contended that the class members have no equitable interest in the fund, that there is no resulting trust, that Congress intended this fund should be defendant's profit, or the Government's profit, in this insurance business, and that it should be paid by defendant into the RFC's treasury or into the federal treasury. However, defendant raised no question of venue or jurisdiction of the court over its person. Defendant's charter made it suable "in any court of competent jurisdiction", like the RFC itself. (See charter in Appendix "A" hereof, clause Third, p. 86.)

The District Court sustained defendant's motion to dismiss (R. 21, 26) (*Matlaw Corporation* v. *War Damage Corporation*, 7 F. R. D. 349). Plaintiff appealed to the Seventh Circuit Court of Appeals, which affirmed the case (R. 77, 83) (*Matlaw Corporation* v. *War Damage Corporation*, 164 F. 2d 281).

BASIS OF THIS COURT'S JURISDICTION.

Jurisdiction is invoked under Title 28, Sec. 350. The Circuit Court of Appeals entertained and denied a timely rehearing petition on December 9, 1947 (R. 121), which is the date of its final judgment sought to be reviewed, and that Court has since stayed its mandate in anticipation of this petition for certiorari (R. 125).

QUESTIONS PRESENTED.

I.

The superficial question appearing in the opinions below is whether these 6,000,000 policyholders constitute a class of such *character*, and have a common claim of such *character*, that they can aggregate their claims for jurisdictional purposes,—in other words whether the jurisdictional amount shown by the complaint is the $208.00 coming to plaintiff individually out of the fund or the $225,000,000.00 fund itself. The Circuit Court of Appeals held it to be the former. Both that Court (R. 82) and the District Court (R. 25-26) based their decision upon cases involving *private* insurance companies. The courts below applied the same rules of law to the policyholders of this liquidated Government insurance corporation as had been applied to going private insurance companies (R. 25-26, 82), contrary to plaintiff's contention that different problems were presented by this Government corporation and by the federal statutes and unique state of facts which gave rise to this fund.

The Circuit Court of Appeals' opinion was handed down October 29, 1947 (R. 77), prior to this Court's decision of November 10, 1947 in *Federal Crop Insurance Corporation* v. *Merrill*, 68 S. Ct. 1; 92 L. Ed. 51. Rehearing was denied (R. 121) shortly after this Court's decision was published, and before Petitioner knew of that decision or had an opportunity to call it to the attention of the Circuit Court of Appeals. That decision, though not on similar facts, lays down the important doctrine that *different legal principles* apply to Government insurance corporations, their contracts and policyholders, than in the case of private insurance companies. That doctrine conflicts with the one on which both

courts below denied jurisdiction. It renders their private insurance company precedents, on which they refused jurisdiction, inapplicable (R. 25-26, 82).

II.

Underlying the above jurisdictional question, is the important federal question: What was the *intent of Congress* in the statutes creating War Damage Corporation? Did Congress intend that this great residuary fund should be treated as a "profit" accruing to defendant, or to its parent, the RFC, or to the Government? Or, did Congress intend that the fund contributed by the policyholders should be used so far as necessary to pay their war damage losses and the residue revert to them? Or, if Congress had no express or actual intent on this subject, through failure to foresee this situation, what intent will this Court impute to Congress in the present situation which arose out of its statutes, under the doctrine of ascertaining the "policy immanent" of Congress, which the Court applied in solving a somewhat similar statutory problem in *Keifer* v. *Reconstruction Finance Corporation,* 306 U. S. 381, 389?

This question is necessarily contained in, and decided by, the decision below, because the jurisdictional question No. 1, supra, depends on the *nature* of the plaintiff class and the *nature* of this fund. That nature necessarily depends on the underlying question, what did Congress *intend* should be the *nature* of these policyholders and the *nature* of this fund?

Further, this question was expressly decided in the Circuit Court of Appeals' opinion saying, "In our case, no trust exists", which necessarily means that Congress did not intend a trust should exist, though the opinion

gives scant discussion of the reason for this basic ruling. (R. 81, 164 F. 2d at p. 283, second column).

III.

If it be determined that Congress intended defendant to engage in the insurance business for profit and to turn this profit over to the RFC or the federal Treasury, this brings up the important *constitutional question:* Could Congress create such a corporation for the *purpose* of engaging in the insurance *business* and making a *profit* for itself, or for the RFC, or for the Government? Or, if it be said that defendant was properly created for the purpose of carrying out the war powers or other expressly granted powers of Congress, and that this fund is an "incidental profit" accruing from its governmental operations, can the "incidental profit" doctrine, as applied to Government corporations and agencies, be extended so far as to cover the very unusual situation here presented, where this Government corporation collected this enormous pool of $225,000,000.00 from the premiums contributed by more than 6,000,000 property owners as part of the war program, for a specific purpose which was accomplished without using the major part of the fund, and where this Government corporation now proposes to turn this residue of the fund over to the RFC or the federal Treasury as an "incidental profit" of 22,500%?

The decision below apparently holds that Congress could and did create defendant as an insurance corporation for profit, because the opinion applies the same rules of law and same precedents to this Government corporation as are applied to private insurance companies for profit. Further, in holding that "no trust exists", it holds that this $225,000,000.00 is either a busi-

ness profit or an incidental profit which it is lawful for defendant to keep and turn over to RFC's treasury or the federal Treasury. However, the opinion gives scant discussion of the basis for these underlying rulings (R. 81, 164 F. 2d at p. 283, second column).

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

I.

The superficial jurisdictional question principally discussed in Circuit Court of Appeals' opinion would be sufficient in itself to warrant review by this Court.

A.

This denial of jurisdiction goes contrary to the spirit and purpose of *Rule of Civil Procedure* 23 and section 24 of the *Judicial Code,* 28 USC 41 (1). The result of denying jurisdiction and denying the class suit remedy in this unique equitable case, involving so large a fund and so large a class, is to drive these 6,000,000 class members out of the Federal Court where their claims properly belong and compel them to file innumerable individual suits in the state courts, or to forego their remedy entirely because their claims are too small to prosecute individually. This denial of federal jurisdiction below is bad for defendant because it subjects defendant to innumerable potential individual suits in the state courts, and it is bad for the class members because it makes their individual remedy too expensive to prosecute (the average amount coming to each of the 6,000,000 class members out of the $225,000,000.00 fund is about $35.00).

B.

While there is no close precedent to this unique case, the decision below conflicts in principle with numerous decisions in other circuits and even in this same circuit, where the class suit remedy was allowed in cases in which its need was less great and its appropriateness was less clear:

Thompson v. *Deal* (1937), 67 App. D. C. 327, 92 F. 2d 478, 483.

Citizens Banking Co. v. *Monticello State Bank,* (8 Cir. 1944) 143 F. 2d 261, 262, 264, 267.

Weeks v. *Bareco Oil Co.* (7 Cir. 1941), 125 F. 2d 84, 88, 90, 91.

Boesenberg v. *Chicago Title & Trust Co.* (7 Cir. 1942), 128 F. 2d 245, 246, pars. 3-5, 141 A. L. R. 565.

C.

This decision also conflicts with recent class suit decisions of this Court. The opinion below concedes that "the Supreme Court has shown increasing liberality in recent decisions permitting the class members to aggregate the value of their individual claims to make up the necessary jurisdictional amount", citing *Gibbs* v. *Buck,* 307 U. S. 66, 59 S. Ct. 725; 83 L. Ed. 1111 (R. 80, 164 F. 2d at p. 283). In *Gibbs* v. *Buck* the class suit remedy was allowed to a numerous class having small individual claims which were less clearly common than in the case at bar. While acknowledging the Supreme Court's policy of "increasing liberality", the opinion below fails to follow it and reaches a reactionary result based on cases not applicable, which are discussed in Point D, infra.

D.

Denial of the class remedy was predicted by both courts below largely on cases involving *going, private* insurance companies (R. 25-26, 82, 7 F. R. D. at p 351, 164 F. 2d at p. 284). They refused to recognize plaintiff's contention that this *liquidated,* war-born, *Government* insurance company was different from the *going, private* insurance companies. Thereby, the Circuit Court of Appeals went contrary to the almost simultaneous decision of this Court, which was not brought to its attention, holding *different legal principles* govern the relations and rights between Government insurance companies and their policyholders, than apply between private insurance companies and their policyholders:

Federal Crop Insurance Corporation v. *Merrill* (Nov. 10, 1947) 68 S. Ct. 1, 92 L. Ed. 51.

II.

More important, and underlying the above jurisdictional question, are an important group of questions of federal law, which have not been, but should be, settled by this Court. War Damage Corporation, with its vast wartime insurance operations touching so many citizens and involving so large a fund, is practically virgin judicial territory. This Court has never passed upon any aspect of the corporation or its operations, nor has any Circuit Court of Appeals, except the one below, passed upon these questions, so far as petitioner knows. These are the questions already stated as Nos. II and III under "Questions Presented", *supra.* These important federal questions were necessarily involved and decided below, as shown under the statement of questions II and III, *supra,* though both questions were given scant discussion in the opinion.

Underlying the jurisdictional question as to the nature of this class and the nature of this fund, is a novel and important cluster of federal questions, which are grouped under question No. II, *supra*, namely: What did Congress intend should be the nature of War Damage Corporation, and the *nature* of this *class*, and the *nature* of this *fund* which Congress authorized this defendant to collect from the class? Did Congress intend that the residue of this fund should be treated as a "profit" accruing to the defendant, as if defendant were a private insurance company? Or, did Congress intend that defendant should operate as a Government instrumentality as part of the war program, collecting this fund from the policyholders and using it so far as necessary to pay their war damage losses, and that the unused residue should revert to the policyholders? Or, if Congress had no actual or express intent on this subject, through failure to foresee this situation, what intent will this Court impute to Congress in the present situation which arose out of its statutes, under the doctrine of ascertaining the "policy immanent" of Congress, which the Court applied in solving a somewhat similar statutory problem in *Keifer* v. *Reconstruction Finance Corporation*, 306 U. S. 381, 389?

There are strong reasons on the face of the statutes and their legislative history for believing that the above questions should be answered in favor of plaintiff and its class,—that Congress did not intend that War Damage Corporation should engage in the insurance business for profit to itself, or to the RFC, or to the federal Treasury, but intended that the residue of this fund should revert to its contributors. Or, to the extent that Congress had no express or actual intent on this subject, through failure to foresee this situation, strong reasons exist why this Court should impute such an

intent to Congress because the basic equities and the principle of resulting trusts so require, and Congress will be presumed to have intended to be equitable and just. This presumption is especially strong where a contrary intent by Congress probably would have been unconstitutional, as shown under III, *infra*. See the annexed brief for the statutes, legislative history, and elaboration of this point.

III.

If it be determined that Congress intended defendant to engage in the insurance business for profit and to turn this profit over to the RFC or to the federal Treasury, this brings up the important group of *constitutional questions* which have been stated under question No. III, *supra*, namely: Could Congress create such a corporation for the purpose of engaging in the insurance business and making a *profit* for itself, or for the RFC, or for the Government? Or, if it be said that defendant was properly created for the purpose of carrying out the war powers or other expressly granted powers of Congress and that this fund is an "incidental profit" accruing from its governmental operations, can the "incidental profit" doctrine, as applied to Government corporations and agencies, be extended so far as to cover this very unique and important situation where the supposed "incidental profit" comprises nearly the entire fund and means a profit of 22,500% on the RFC's investment?

Strong reasons and precedents exist for answering both of these questions in the negative. These reasons rest upon the doctrine beginning in *M'Culloch* v. *Maryland*, 17 U. S. (4 Wheat.) 316, 4 L. Ed. 579, and extending down to *Federal Crop Corporation* v. *Merrill*, 68

S. Ct. 1, 92 L. Ed. 51, that while Congress can create Government corporations as a means of executing the powers granted to it by the Constitution, the nature of such corporations is essentially different from private corporations, their primary purpose is not profit, and different legal results frequently flow from their contracts and operations with the citizens than in the case of private corporations, even in the same field.

If Congress intended to launch defendant into the commercial insurance field for the primary purpose of making a profit in the insurance business, and if this intent must fail because it is unconstitutional, then a resulting trust exists in this residue in favor of the plaintiff class, as much as if Congress had intended the right thing. This question was necessarily involved below, and the Circuit Court of Appeals necessarily decided it against Petitioner when it held: "In our case, no trust exists". (R. 81, 164 F. 2d at p. 283, second column here).

IV.

The above questions under II and III fall in the category of important national and constitutional questions which arise out of the war and out of "the broadening phases of federal activities in the commercial or business field" (*Brady* v. *Roosevelt Steamship Co.*, 317 U. S. at p. 580). This general field has been the subject of numerous recent decisions by this Court, none of which involve War Damage Corporation or solve the questions here presented. The present questions equal, or exceed, the importance of those already passed upon, both in their fundamental character, the vast number of citizens affected in this case, and the great amount of the fund involved.

This case presents in simple but acute form a number of unanswered national and constitutional questions underlying the forty or more Government corporations which Congress has created during the past two decades (*Keifer* v. *Reconstruction Finance Corpn.*, 306 U. S. at p. 390), originally as part of the national recovery program, and later as part of the war program; sometimes creating them by direct statute, but more often creating them through the broad and vague power which Congress delegated to the RFC "to create or organize * * * a corporation or corporations with power * * * (g) to take such other action as the President and the Federal Loan Administrator may deem necessary to expedite the national defense program * * *", (Sec. 5(d) of the RFC Act; Title 15, sec. 606b).

This group of questions have reached the point where they greatly need to be answered, because here is a class of 6,000,000 citizens who are claiming the right to be in the Federal Court and claiming equitable ownership of this $225,000,000.00 fund, all depending on the solution of these questions.

Wherefore, Petitioner respectfully prays that this Court may issue its writ of certiorari and review this cause, and for all just and proper relief in the premises.

James E. Watson,
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947.

No.

MATLAW CORPORATION,
Petitioner,

vs.

WAR DAMAGE CORPORATION,
Respondent.

BRIEF SUPPORTING PETITION FOR CERTIORARI.

The essential facts are sufficiently stated in the foregoing petition, and those on special aspects of the case are treated in the argument, *infra*, under the appropriate headings.

The basic facts are simple and fundamental. They appear largely from the congressional and other public records, from the official records of defendant, from the complaint (R. 1) which is admitted by the motion to dismiss (R. 15), and from the opinions of the District Court and Circuit Court of Appeals (R. 21, 77).

If there should be any lack of detailed facts in this record (and Petitioner does not believe there is), this would be due to the summary manner in which the courts below threw this novel and important case out of court on defendant's motion to dismiss (R. 26), without giving plaintiff an opportunity to bring out more detailed facts by deposition (R. 16) or trial. This is treated more at length at page 47, *infra*.

SUMMARY.

I.

The jurisdictional question merits review.

A.

"This case is of the type where the question of jurisdiction is dependent on decision of the merits." In such a situation this Court has brought up cases for review of jurisdictional and other questions which are "fundamental to the further conduct of the case", even when the decision of the Circuit Court of Appeals was not final, (though in the case at bar the decision is final in both courts below):

Land v. *Dollar*, 67 S. Ct. 1009, 1010, par. 1, 1011, top of 1st column; 91 L. Ed. 903, 905-906.

United States v. *General Motors Corp.*, 323 U. S. 373, 377, 65 S. Ct. 357, 359, 89 L. Ed. 311, 156 A. L. R. 390.

Inherent in the superficial jurisdictional question in this case are the important federal questions discussed under II, *infra*, and the constitutional questions discussed under III *infra*.

B.

But standing alone, the jurisdictional question would merit review by this Court because of the enormous size of the class, and of the fund, and the public importance of reviewing a decision which in effect turns these 6,000,000 class members out of the federal court without remedy. (Their claims average $35 each, and most are too small to litigate individually.) The decision of the learned Court below reaches a reactionary and impractical result which is in basic conflict with recent decisions of this Court and of other circuit courts of appeals, on jurisdiction in class suits:

Gibbs v. *Buck* (1939), 307 U. S. 66, 72-74, 59 S. Ct. 725, 729; 83 L. Ed. 1111.

Thompson v. *Deal*, 67 App. D. C. 327; 92 F. 2d 478, 483.

Troy Bank v. *Whitehead*, 222 U. S. 39, 40; 32 S. Ct. 9; 56 L. Ed. 81.

C.

The decision below is based on cases involving going, private insurance companies. These are not applicable to this liquidated, Government insurance company, as this Court held a few days after the opinion below:

Federal Crop Insurance Corporation v. *Merrill*, 68 S. Ct. 1, 3, 92 L. Ed. 51, 53.

Private insurance company cases are still less applicable to this defendant than they were to Federal Crop Insurance Corporation. The latter is a going corporation which actually does insurance business directly with the citizens. Defendant, on the other hand, was only a skeleton subsidiary of RFC. It had no pay roll (the RFC

personnel did its office work, page 92, *infra*). It issued no policies directly (the several hundred private insurance companies which it appointed as its "fiscal agents" issued the policies over its facsimile signature and collected and remited the premiums to it, page 100, *infra*).

II.

The federal questions merit review.

A.

As a matter of federal law, defendant is, in reality, merely a skeleton corporation which the RFC chartered in great haste to serve as a receptacle to collect and hold this vast pool of the property owners' money, for their mutual protection, as part of the war program, to be used to pay their expected war damage losses.

Due to the haste and excitement of war which surrounded the creation of defendant, Congress failed to foresee that this pool might remain almost entirely unexpended and failed to provide expressly what should be done with it in the present situation. If it be said that Congress expressed no intent to return it to the contributors, it is equally true that Congress expressed no intent to have defendant make a speculative "profit" of 22,500% on a gigantic insurance gamble with the nation's property owners and then turn this "profit" over to RFC or the federal Treasury.

B.

In this situation, this Court has the high constitutional function to "divine" the intent of Congress and to declare the legal results flowing therefrom, "by a process of interpretation which, in effect, is the ascertainment of policy immanent."

Keifer v. *Reconstruction Finance Corporation*, 306 U. S. 381, 389, 59 S. Ct. 516, 518-521.

Markham v. *Cabell*, 326 U. S. 404, 409, 66 S. Ct. 193, 195.

C.

The basic purpose of Congress, as shown by the terms of the war damage statute and its legislative history, was to have defendant act in a parental attitude toward the nation's property owners, to quiet their fears and bolster their war morale by providing "reasonable protection" against war damage.

Defendant's position toward the nation's property owners was fundamentally that of a *government-created trustee* for them. True, Congress directed defendant to collect from them a "premium or other charge," but Congress intended this should be only "enough to *cover cost* and incidental charges" of furnishing the protection, in the words of House Committee chairman Steagall in explaining the bill to the House. Also, Senator Maloney, in charge of the bill in the Senate, told that body in presenting the conference report: "One of the *principal* purposes of the amendment is to keep the rates at a *low cost.*"

Amendment of March 27, 1942, adding Sec. 5(g) to RFC Act, 56 Stat....., 15 U. S. C. A. 606b-2, quoted at page 52 of this brief.

Statement of House Committee chairman Steagall: Cong. Rec., Vol. 88, No. 43, p. 1903, 3rd column.

House Conference Report: Cong. Rec. Vol. 88, No. 55, p. 2686, 2nd column.

Statement of Senator Maloney: Cong. Rec. Vol. 88, No. 56, p. 2770.

D.

Congress gave very loose directions and broad discretion to defendant as to the *means* of carrying out the above *purpose.* It is important to note that Congress spoke of "reasonable protection" to the nation's property owners against war damage as being the *purpose.* It merely authorized defendant to issue "insurance" as *one* of the *alternative means* of accomplishing that object:

> "The Reconstruction Finance Corporation is authorized to and shall empower the War Damage Corporation to use its funds to provide, *through* insurance, reinsurance, *or otherwise,* reasonable *protection* against loss of or damage to property, real and personal, which may result from enemy attack. * * *" (Our emphasis)

15 U. S. C. A. 606b-2, quoted at p. 52 hereof.

E.

The "uniform rate" provision of the Act declares that "in view of the *national interest* involved" the defendant "*shall* from time to time establish *uniform* rates" throughout the entire nation, regardless of the exposed or non-exposed location of the property. This is inconsistent with the idea of an insurance business for profit, but it is consistent with the idea of a nation-wide insurance pool to which the nation's property owners should contribute equally for mutual protection as a war measure, with Congress and the RFC setting up defendant as an instrument for that purpose.

15 U. S. C. A. 606b-2, quoted at p. 53 hereof.

F.

The "free protection" provision of the Act is one of the strong indications against an intent by Congress to take

this fund as a "profit." Congress specified that defendant should give free protection to all property owners up until the date it would start charging for protection (which was later fixed as July 1, 1942). This expressed intent to be generous to the first class of property owners, who paid nothing and did nothing to aid the Government's program, is utterly inconsistent with the theory advanced by defendant that Congress intended to turn around and be hard and niggardly and exact an enormous "profit" from this second class of property owners who aided the Government's program by buying policies and contributing this enormous pool.

15 U. S. C. A. 606b-2, clause (b) at end of section, quoted at page 53 of this brief.

G.

The exaction of this gigantic, speculative, windfall "profit" of 22,500% is so inequitable that the Government would not tolerate any private corporation doing it, either in the corporation's dealing with the citizens or with the Government. If a private corporation had tried to do this to the citizens in wartime, a dozen Government agencies would be investigating and prosecuting it. If the private corporation or a citizen had tried to make such a windfall profit in dealing with the Government or with a Government corporation, the Government would have invoked the re-negotiation statute to prevent it—a statute which Congress passed only a month after the above war damage Act of March 27, 1942:

Renegotiation Act of April 28, 1942, c. 247, Title IV, sec. 403, 56 Stat. 245; F. C. A. Vol. 11, Title 50, Appendix 31.

It should be presumed that on March 27, 1942, Congress intended to be as fair with the citizens to whom it was going to have this Government corporation sell protec-

tion, as it required the citizen to be to the Government corporations when, a month later, it passed the above renegotiation Act of April 28, 1942. The latter Act shows a congressional policy against windfall profits out of the war, such as defendant now tries to claim.

H.

Congress intended that the RFC, in this instance, should adhere to its previous function of being the nation's emergency banker or money lender—not that it should be an investor or speculator in defendant's capital stock for the purpose of making a "profit" for itself or for the Treasury out of defendant's operations. The Act says in its opening sentence that the RFC "is hereby directed to continue to *supply funds* to the War Damage Corporation." Nothing is said in the Act about RFC becoming a stockholder of defendant. That was merely part of the mechanics adopted by the RFC for the purpose of creating and controlling defendant, not for the purpose of making a stockholder's profit for itself or the Treasury.

15 U. S. C. A. 606b-2, quoted at p. 52, *infra*.

I.

Another significant circumstance is that Congress purposely deleted the word "insurance" from defendant's name "War *Insurance* Corporation" as given in its charter (page 85, *infra*). During hearings on the bill (S. 2198) before the Senate Banking and Currency Committee, a member criticized the word "insurance" in the corporate name and said it was "misleading" as to defendant's nature and function—that defendant's function really was protection—and Mr. Jesse Jones, the witness, agreed (Hearings on S. 2198, pp. 10-11). The name was

changed to "War *Damage* Corporation" in that committee report (Senate Report 1012) and this was retained in the enacted bill (15 U. S. C. A. 606b-2, page 52, *infra*).

J.

Analysis of Defendant's Arguments Below.

Various excuses offered by defendant in the courts below for keeping this fund as a "profit" might appear plausible at first blush but are unsound upon analysis, namely:

(1) That the Government and taxpayers "took the risk" of loss in this insurance business, and hence, the taxpayers should have the profit. This is unsound because:

(a) This supposed argument in favor of the taxpayers actually means robbing one class of taxpayers to aid the others. These 6,000,000 property owners are the largest group of taxpayers in the nation. Diverting their money from its intended special use, into the Treasury for general government use, simply reduces the burden of taxes and national debt for the benefit of the *other* taxpayers.

(b) In reality, the Government and general taxpayers took no great risk. Congress effectively avoided this risk to the Treasury by means of the "uniform rate" provision. This gave defendant unlimited authority to fix its "premium or other charge" as high as might prove necessary "from time to time" to carry the losses, and required defendant to spread the charges evenly over the entire country, regardless of the exposed or non-exposed location. This made the class so enormous and wide-spread that even heavy losses in one section could and would have been made up by the premiums contributed from other sections. 15 U. S. C. A. 606b-2, page 53, *infra*.

The RFC and other Government agencies effectively enlarged the class by compelling all of their thousands of large borrowers throughout the country to purchase war damage insurance from defendant, whether they wanted it or not (R. 6).

(2) That the class members "got what they paid for," and now the Court should hold them to their bargain. This argument is unsound because:

(a) What they paid for in reality was not a piece of paper, the policy, but the opportunity to join this great Government-sponsored pool. They were not "bargaining" freely at arm's length with a private trader but were *trusting* their government to treat them fairly in a strange field where the government had a monopoly and where they were under the economic pressure of war. A more accurate statement would be that they have already "paid for what they got" and that the unused residue of their contributions should be refunded.

(b) It was impossible to fix a fair "price" for the class members to pay for this protection, due to the lack of any standard to measure it, plus the haste with which Congress had to launch defendant as a war emergency measure. The program pursued by defendant was to make the rates high, to collect a vast pool of money quickly, to be ready for an emergency, to help win the war, and to leave the equities for adjustment after the war, (which is what this class is now asking this Court to do). That was a proper war program for defendant to pursue. But it is wrong for defendant now to try to distort that situation by painting itself as a commercial insurance company which dealt at arm's length with property owners, sold them a standard commodity, "gave them what they paid for," and therefore is entitled to keep the money they paid in as a "profit."

(3) That "the successful prosecution of the war" by the Government kept the war damage losses low, and it is somehow wrong for the class members to ask for a refund of the residue of this fund which was thereby saved. This argument is highly unfair and unsound, because:

(a) These 6,000,000 class members and their families contributed their full share of blood, taxes and bond purchases toward winning the war, along with the other citizens who are not members of this class. Their payments into this pool were *over and above* their general war sacrifices, and were for a *special* purpose. The national victory is no excuse for mis-appropriating this fund into the national Treasury.

(b) This fund has already had deducted from it the very heavy overhead expense of about $44,000,000 in order to administer and pay out $73,000 of actual losses to these class members. The class members are offering to bear this expense in full and to do full equity. They ask only the *residue* of this fund after the RFC gets back its original $1,000,000.00 stock investment, after all losses have been paid (including $617,000.00 of losses on "gift insurance" before defendant started to issue policies), and after deducting all of defendant's expenses (including about $42,000,000.00 of commissions, expenses and participation paid by defendant to its several hundred "fiscal agents", the private insurance companies). See financial statement in Appendix "B" hereof, page 95, for details.

(4) That Congress "approved the rates" which defendant proposed to charge. This argument is both untrue in fact and unsound in law, because:

(a) It was predicated below on a fragment from the Congressional Record, whereas the context shows that

Congress *refrained* from fixing any rates at the request of Mr. Jesse Jones. While Mr. Jones quoted some tentative rates which he and defendant "thought" would be "appropriate," and the conferees "thought the suggested rates were as reasonable as could be expected," the context shows that this was merely a casual comment, that nobody had any means of measuring what was a reasonable rate. The attention of Congress was focused, not on *specific rates* but on the *purpose* of defendant. The basic idea expressed by both Mr. Jones and the conferees was that "since losses resulting from the war are a *national responsibility*, there should be no discrimination in rates because of a geographical location," and further that "one of the *principal objects* of the amendment is to *keep* the rates at a *low cost.*" (Our emphasis)

Congressional Record, Vol. 88, No. 56, p. 2770.

(b) Even if Congress had expressly approved the proposed *rates*, that would not solve the present question of what *disposal* Congress intended to make of the residue of this *fund* after the war.

K.

Resulting Trust and Restitution.

Defendant's basic nature is that of a *Government-created trustee* for the nation's property owners. Under the original concept of the President and Mr. Jones, defendant was the free giver of protection, with the fund coming from the Treasury through RFC. Congress modified the *source* of the *fund*, so that it was to be contributed by the nation's participating property owners, uniformly, and "enough to cover cost." Originally, the property owners were donee-beneficiaries. Congress made them *contributing* beneficiaries. At first, defendant was a re-

ceptacle to receive and distribute a fund coming from the Treasury through RFC. Congress modified defendant into a receptacle to collect and distribute the property owners' money. But Congress did not depart from the basic *trust function* of defendant.

Since Congress was working under great pressure, and since its attention was directed to the idea of only collecting "a low rate" and "enough to cover cost," it failed to foresee and make express provision for the *result* which has developed, where almost none of the fund was used to pay losses and an enormous unused residue has *resulted*. The remedy for such an *unforseen result* to a fund is the basic equity doctrine of *resulting trust* and the closely related doctrine of *restitution*.

Thompson v. *Deal*, 67 App. D. C. 327, 92 F. 2d 478, 483, par. 3.

Land v. *Dollar*, 67 S. Ct. 1009, 1011, 1012, 91 L. Ed. 903, 905-906.

Hopkins v. *Grimshaw*, 165 U. S. 348, 355, 17 S. Ct. 401, 406, 41 L. Ed. 739, 743.

Indianapolis Bible Institute v. *Kiddey*, 98 Ind. App. 567, 572, 187 N. E. 846.

Reed v. *Kellerman*, D. C. E. D. Pa., 41 F. Supp. 46, 50, pars. 7-9.

46 Am. Jur., Restitution and Unjust Enrichment, page 99.

L.

The federal judicial power is ample to declare and enforce this resulting trust or restitution. The Constitution vests full equity power in the Judicial Department. And "the extent to which a court of equity may grant or withhold its aid, and the manner of moulding its remedies, may be affected by the public interest involved."

Judicial Code, sec. 24, 28 U. S. C. A. 41(1).

Constitution, Article III, secs. 1 and 2.

Kansas v. *Colorado,* 206 U. S. 46; 27 S. Ct. 655, 661.

United States v. *Morgan,* 307 U. S. 183, 194, 59 S. Ct. 795, 801, par. 9.

The same remedies exist against defendant as against a private litigant. Its charter gives it power "to sue and be sued in any court of competent jurisdiction," (clause Third, p. 86, *infra*), and such is the law generally as established by this Court relative to the RFC and its subsidiaries:

Keifer v. *Reconstruction Finance Corporation* (1939) 306 U. S. 381, 390-396; 59 S. Ct. 516, 518-521.

Reconstruction Finance Corporation v. *I. G. Menihan Corporation* (1941), 312 U. S. 81, 83-85; 61 S. Ct. 485, 486-487.

Sovereign immunity is not here involved, and defendant made no such contention in either court below:

Land v. *Dollar,* 67 S. Ct. 1009, 1011-1012, 91 L. Ed. 903, 905-906.

III.

The consitutional questions merit review.

A.

If it be determined that one of the primary objects for which Congress created defendant was to make a profit for the Government, either directly or through the RFC as a conduit, this object was unconstitutional and void. In that event the result will be the same as if Congress had intended the right thing. The unconstitutional object (to take this residuary fund as a profit) failing, equity will restore the fund to its contributors un-

der the doctrines of resulting trust and restitution discussed under the preceding proposition II.

B.

"The Government may carry on its operations • • • through corporate forms especially created for defined ends." But the primary object of the corporation must be "for carrying into execution" the expressly granted powers. Profit-making for the Government cannot be the primary object or one of the primary objects.

Federal Crop Insurance Corporation v. *Merrill*, 68 S. Ct., 1, 3.

M'Culloch v. *Maryland*, 4 Wheat. (17 U. S.) 314, 407-411, 4 L. Ed. 579, 602.

C.

Granting that a Government corporation can make an "incidental profit" in connection with carrying out its primary legitimate functions, the actual situation now presented to this Court makes it impossible to treat this residuary fund as an incidental profit (where the major part of the fund collected by the corporation for a special purpose remains unused in its hands and the purpose has disappeared, so that the so-called "incidental" profit would be about 225 times the capital investment or 22,500%).

D.

In a case of this kind, the constitutional test must always be applied to the *existing situation*, not on a basis of what "*might* have happened". The latter has been the main excuse offered by defendant in the courts below

for keeping this fund as a profit. Such argument is very dangerous, particularly in a case of this kind, because it would offer the temptation, and open the door, for these great Government corporations to depart from their basic and legitimate constitutional function of furnishing services and *protection* to the people and would let them become *traders* with the people for *profit*. This would be detrimental to the people, to private business, and most serious of all, it would be an insiduous and dangerous encroachment by these governmental instrumentalities into fields beyond their proper boundaries.

This is the type of case where it is particularly urgent for this Court to look through form and technicality and be alert to the *actual situation*.

United States v. *Butler*, 297 U. S. 1, 68-69, 56 S. Ct. 312, 320, par. 13, 80 L. Ed. 477.

E.

The profit motive is repugnant to the lofty protective motives for which the President and Congress created defendant. See pages 50-55, and 64-65, *infra*.

The RFC has successfully urged, and the courts have held, that it is "a corporation *not engaged in business for profit* with the attendant *motive* oftentimes found to take advantage of those with whom it deals". This paternal and broadly fiduciary role has been used by the RFC and the courts as a ground for giving it important *privileges* in dealing with the people and the business concerns of the nation:

Todd v. *Maryland Casualty Co.*, 7 Cir. 155 F. 2d 29, 38, par. 7.

F.

The war emergency, furnished the *occasion* for the exercise of congressional power by creating defendant to perform the function of furnishing "protection" to the nation's property owners. But the emergency could not endow Congress with any *new power* to create a profit-making corporation.

Defendant's war function repels the idea that it had a profit-making function. Its war function strengthens our contention that its actual function (and the only one it could legitimately have) was to serve as an instrument to make possible a co-operative effort by the nation's property owners—to furnish a receptacle in which the Government invited them to pool their money for mutual protection, whereby they would pay in enough of their own money "to cover cost and incidental charges" of their own protection—to guard the Treasury against loss but not to make a profit for the Treasury:

> "Thus, the war power of the federal government is not created by the emergency of war, but it is a power given to meet that emergency. It is a power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a *supreme co-operative effort* to preserve the nation." (Our emphasis.)
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> *Home Building & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 426; 54 S. Ct. 231, 235, 2d column; 78 L. Ed. 413.

G.

Before defendant can justify its withholding of this fund from the contributors, and justify its asserted intention of turning it over to the RFC or the Treasury, it must show a constitutional grant of power, express or incidental, so to do:

"Every acquisition, *holding*, or disposition of property by the Federal Government depends upon *proper* exercise of a constitutional *grant of power.*" (Our emphasis.)

United States v. *Allegheny County*, 322 U. S. 174, 192; 64 S. Ct. 908, 913, par. 1.

H.

This Court's jurisdiction is not affected by the Act of July 30, 1947 attempting to oust the jurisdiction of the Circuit Court of Appeals. Congress attempted to dispose of this fund and to decide the question involved in the appeal by legislative fiat while the appeal was pending. This attempt by Congress to encroach upon the functions of the Judicial Department is serious from a governmental standpoint, and it was aggravated by the arbitrary attitude of Senator Ferguson's sub-committee which heard the bill. See pages 76-83, 89-100 hereof for the record and discussion of this subject.

ARGUMENT.

Petitioner believes that the novelty and importance of this case, and its need for review by this Court, will be self-apparent from the petition and that no elaborate brief on the merits of the case is necessary or even appropriate at this stage, since the Rules contemplate that these questions will be briefed *de novo* and elaborated if certiorari is granted.

I.

The Jurisdictional Question.

The important federal and constitutional questions regarding the proper interpretation and legal effect of the statutes creating War Damage Corporation are *inherent* in the jurisdictional question. The latter cannot be answered without determining the *nature* of the plaintiff *class* and the *nature* of this *fund*. That, in turn, depends on those basic questions.

These inherent questions were actually decided by the Circuit Court of Appeals when it held: "In our case, no trust exists", though these underlying questions were given scant discussion in the opinion (R. 81, 164 F. 2d at p. 283, second column.

However, the superficial jurisdictional question, standing alone, would amply merit review by this Court because of the enormous size of the class, and of the fund, and the public importance of this situation where denial of jurisdiction and denial of the class remedy amounts to a denial of all remedy to a great majority of these 6,000,000 class members whose claims, averaging $35.00

each, are too small to litigate individually, as the opinion below holds must be done.

As a practical matter, no conceivable case comes so clearly within the spirit of section 24 of the *Judicial Code*, 28 U. S. C. A. 41 (1), which says that federal jurisdiction exists:

> "Where the *amount in controversy* exceeds, exclusive of interest and costs, the sum of $3000.00, and (a) arises *under the constitution or laws of the United States.*"

And no case has ever been so clearly within the letter and spirit, and so much in need, of the class suit remedy provided by *Rule of Civil Procedure* 23:

> "Class actions—(a) Representation. If persons constituting a class are *so numerous* as to make it impracticable to bring them all before the court, such of them, *one* or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is:
>
> (1) joint, *or common*, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;
>
> (2) several, and the object of the action is the *adjudication* of claims which do or may *affect specific property involved in the action* * * *" (Our emphasis.)

Plaintiff sought no individual relief for itself apart from the class, nor did it sue defendant upon the insurance *contract*. It sued to impress a trust upon the entire residuary fund in defendant's hands, for the *common pro rata* benefit of the entire class. The action is grounded, not upon any individual contract, but upon the statutes and defendant's course of dealing with the entire class, and the basic equities flowing therefrom in favor of the class (R. 1-5).

In fact it is not only proper but *indispensable* to litigate this class claim in *one suit* and in *one court.* It would be legally impossible for the class members to sue separately in many state courts all over the country, as the opinion below holds they must. This is because the amount coming to *each* class member is *dependent* upon the amount coming to *every other* member. The residuary fund of this *liquidated* corporation is not large enough to repay them 100% of their contributions, because part of it was paid out for losses and a still larger part for administrative expenses and agents' commissions, so the situation is somewhat analogous to the distribution of the funds of a closed bank among its depositors where they are participating *pro rata* in the distribution.

Without encumbering this brief by a large number of authorities, the following case, which is the most analogous one Petitioner finds, holds that a representative class suit was proper to impress a *trust* upon and distribute a *fund* of money among the numerous contributors, when the fund was in the hands of the Agricultural Adjustment Administration and the latter was about to make an improper disposal of it. The Court said:

> "We think the suit is in the nature of an action to impress a fund with a *trust* and compel its restoration, and we think it is *properly* brought as a *class suit.* Here there is an identity of parties and an *identity of interests;* if *one* of the appellants can recover, *all* can recover, and if they do not proceed as a class there must then be a *multiplicity* of suits. The governing rule is stated in *Hartford Life Insurance Co.* v. *Ibs,* 237 U. S. 662-672, 35 S. Ct. 692, 59 L. Ed. 1165, L. R. A. 1916A, 765, and *Watson* v. *National Life & Trust Co.* (C. C. A.) 162 F. 7." (Our emphasis.)
>
> *Thompson* v. *Deal,* 67 App. D. C. 327, 92 F. 2d 478, 483, par. 5.

A recent decision of this Court permitting class members to *aggregate* the value of their individual claims to make up the jurisdictional amount, when their claims were less clearly common than in the case at bar, is *Gibbs* v. *Buck,* (1939), 307 U. S. 66, 72-74, 59 S. Ct. 725, 729, 83 L. Ed. 1111. This was a class suit by representative plaintiffs on behalf of a large class of authors and composers who held individual copyrights on their own individual compositions. They had pooled these for mutual protection, and their representatives who operated the pool had licensed their performance in the State of Florida. Florida passed a restrictive statute and they brought this class action to enjoin its enforcement. The amount of financial gain, which the individual class members would derive, varied according to their different compositions and the demand therefor. In this respect they were more individual than the class members in the present case. Nevertheless, this Court held that the $3000 jurisdictional amount was established even though no one of them could show himself damaged to that extent, their individual losses being in most cases only a few dollars apiece. This Court said:

> "In view of the unchallenged facts, Federal jurisdiction will be adequately established * * * if to the *aggregate* of all the members of this representative suit, the mattter in controversy is of that value" (more than $3000.00). 30 U. S. at bottom of p. 72).

The following insurance case, which was cited as authority in *Thompson* v. *Deal,* 67 App. D. C. 327, 92 F. 2d 478, 483, *supra,* holds that a representative class action was proper for the purpose of settling the common rights of thousands of policyholders in a fund. The court said:

> "The fund was single, but having been made up of *contributions* from thousands of members their interest was *common.*" (Our emphasis.)
>
> *Hartford Life Ins. Co.* v. *Ibs.* 237 U. S. 662, 35 Sup. Ct. 692, 695, 50 L. Ed. 1165.

The following case holds that the *separate* holders of *promissory notes* can join and *aggregate* the amount of their claims for jurisdictional purposes where they have the common interest that their notes are secured by the same lien and therefore *payable* out of the same *fund*, even though they hold separate and distinct individual notes and have separate and distinct amounts coming out of the fund. The court said:

> "The present suit is of the latter class. Its *controlling object*—that which makes it cognizable in equity—is the enforcement of the vendor's lien, which is a single thing or entity in which the plaintiffs have a *common* and *undivided* interest, and which neither can enforce in the absence of the other. Thus, while their claims under the *notes* were *separate* and *distinct*, their claim under the vendor's lien was single and undivided, and the lien was sought to be enforced as a *common security* for the payment of both notes." (Our emphasis.)
>
> *Troy Bank* v. *Whitehead*, 222 U. S. 39, 40, 32 S. Ct. 9, 56 L. Ed. 81.

Precedents in Opinion Below Distinguished.

The reactionary and impractical result reached by the learned Court below comes from the fact that the Court failed to consider the *underlying character* of this class and of this fund but decided the case on the basis of earlier decisions involving *going, private* insurance companies. None of those precedents are in point because:

(1) There is a distinction between private and government insurance companies and the legal relations between them and the citizens with whom they do business, even in the same field, as this Court recently held in *Federal Crop Insurance Corporation* v. *Merrill*, 68 S. Ct. 1, 92 L. Ed. 51.

(2) Even if defendant were a private company, there is an important distinction between a *liquidating* company, such as defendant, and *going* companies such as the precedents cited below. In the case of a going company, it may be feasible for the Court to require the individual contract holders to litigate their separate rights against the company if they claim money coming out of a surplus fund. In the case of a liquidating company, particularly where the fund comprises the company's entire assets, it is essential for one court to assume jurisdiction over, and distribute, the fund.

(3) The precedent principally relied upon by the Circuit Court of Appeals (R. 82), and even more so by the District Court (R. 25), was *Andrews* v. *Equitable Life Insurance Society,* 7 Cir., 1941, 124 F. 2d 788. That case is further distinguishable on the ground that it involved a *New York company* and a *New York contract.* Accordingly the Court was obliged to apply the *New York law,* which is to the effect that trust rights are not recognized but the contract is the sole source of a policy holder's rights. The *Andrews* opinion rests upon other New York opinions which it cites, including *Equitable Life Assurance Society* v. *Brown,* 213 U. S. 25, 47, 29 Sup. Ct. 404, 411, 53 L. Ed. 682. In the latter case this Court placed its decision on a point of *New York law,* which it was obliged to follow in dealing with a New York company and a New York contract, saying that the trust fund doctrine "has never been regarded as the law in the state of New York (citing New York cases), nor anywhere else so far as any case has been cited on the subject" (213 U. S. at p. 46). The last phrase is merely casual dictum, and the point decided was not the right to maintain a class suit but the right of policyholders to assert a trust against the company under New York law.

In the District Court below defendant was fair enough to make the following statement in its filed brief, which we suppose it will not depart from here:

> "Admittedly, the *Andrews* case may be distinguished. In the *Andrews* case, the Court was dealing with a New York insurance company. The Supreme Court of the United States held that in such situations the New York law is applicable. *Equitable Life Insurance Co.* v. *Brown*, 213 U. S. 25. The New York law is clear that the contract was the governing instrument in cases of this sort. * * *"

The *Andrews* case, and all similar cases dealing with private contracts between private insurance companies and their policy holders, are further distinguishable on still more fundamental grounds: Our situation, though having some superficial resemblance to such private companies and private contracts, is fundamentally different. Private insurance contracts are made over extended periods, in the ordinary course of insurance business (life insurance in the *Andrews* case), where the company is a continuing concern, and it is entirely practicable for the contract holders to litigate their private contract rights with the company in their various jurisdictions regarding their rights to its surplus funds, the same as they would litigate a dispute with the company regarding their death or other benefits. As already pointed out, this defendant is an RFC subsidiary, now in process of *liquidation*, born overnight as a war emergency and as quickly out of business at the close of the war, after collecting in a short space of time this enormous fund of $225,000,000.00 from 6,000,000 property owners, far beyond the nature or scope of any private insurance business. In fact defendant was created for the very reason that this war enterprise could not be handled by private companies or private contracts. Though nominally an insurance company, it was actually a gigantic government-sponsored *pool* of the 6,000,000 property owners' money,

which they poured into this receptacle at the Government's invitation, as mutual protection against enemy action which never materialized. This point will be elaborated under heading II, *infra.*

In the *Andrews* case, it was entirely appropriate for the court to say that each policy holder's rights "stem from the contract" and that each must go it alone in litigating its contract rights with the company. However such language is entirely inappropriate to this situation (and naturally the Court never had this situation in mind when it wrote the *Andrews* opinion). Here the rights of these class members do not stem primarily from some *private contract* with a *private company.* They stem from *basic principles of equity,* and particularly from the principle of *resulting trusts,* and also the principle of *restitution,* as applied to the extraordinary state of facts set forth in the complaint. The so-called "policies" issued by defendant to the class members, though superficially resembling private contracts, actually were fundamentally different. The legislative history of defendant shows that the very reason for its creation was because private insurance companies *could not issue ordinary policies* to meet this extraordinary war-time situation. The issuance of these "policies" in vast number, in a short space of time, as a war-time measure, identical in form and uniform in rate for the whole country, was simply part of the *mechanics* by which this Government-sponsored corporation set up and operated this gigantic pool. This action is not *based on* the "policies." It seeks no money judgment against defendant, but only to declare a trust upon the fund for the *common benefit* of the class and to distribute it to the members *pro rata.*

Accordingly, it is no answer to argue, as does the opinion below and Respondent, that these class members' claims cannot be aggregated because they arise

from "separate and distinct" contracts. As shown in the preceding paragraph, the asserted common right is not based upon the contracts but upon the great underlying equities. The contracts are merely part of the mechanics of operating this gigantic Government-sponsored pool and not the ultimate test of its character.

But even if it were admitted, for sake of argument, that the class members' rights did in fact depend upon individual contracts, this would not suffice to destroy the class remedy or the jurisdiction. Such argument would almost always prevent the use of the class remedy, and destroy the jurisdiction, because the class members' rights nearly always arise from individual contracts or transactions whereby the money of each member separately gets into the hands of the fund-holder. This was true in *Thompson* v. *Deal,* 92 F. 2d 478, *supra,* where the class members had made their individual payments into the fund and individual certificates had been issued to evidence the contributors' interest in the fund. Likewise, separate instruments had been executed by the individual class members in *Gibbs* v. *Buck,* 307 U. S. 66, assigning their individual compositions to the Society which held the pool (p. 72, bottom). Also in *Hartford Life Insurance Co.* v. *Ibs,* 237 U. S. 662, *supra,* the class members had made their individual premium contributions under individual policies, and in *Troy Bank* v. *Whitehead,* 222 U. S. 39, 40, *supra,* the individuals held separate notes secured by a common lien, which was their common bond of interest.

Having discussed the *Andrews* case, 124 F. 2d 788, in some detail, *supra,* a brief discussion will suffice to show that the other precedents relied on in the opinion below are even more remote from the real question. Taking them in the order cited in the opinion (R. 82):

Rogers v. *Hennepin County*, 239 U. S. 621, 36 S. Ct. 217, 60 L. Ed. 469, holds that members of a Chamber of Commerce who want to enjoin the collection of taxes on their individual properties cannot aggregate their individual taxes for jurisdictional purposes, and that their membership in the Chamber of Commerce does not change this result—quite an obvious proposition.

Lion Bonding & Surety Co. v. *Karatz*, 262 U. S. 77, 43 S. Ct. 480, 67 L. Ed. 871, did not involve a class suit. It was where a single contract creditor sued a corporation on its debt to him and sought appointment of a corporate receiver. The court held that the jurisdictional amount so far as he was concerned was the amount of his debt and not the debts owed by the corporation to other creditors. The opinion, however, recognizes that when plaintiffs have a common undivided interest and seek to enforce a single basic right, they can aggregate their interests for jurisdiction (262 U. S. at p. 86).

Clark v. *Paul Gray, Inc.*, 306 U. S. 583, 595 Ct. 744, 83 L. Ed. 1001, decided the same day as *Gibbs* v. *Buck*, 307 U. S. 66, *supra*, recognizes the rule in that case but holds that where separate auto dealers sought a federal court injunction against collection of a state license fee, they had "no joint or common interest" because the complaint and findings showed that each was seeking to protect "his own separate and independent *business*" (306 U. S. at p. 588, bottom).

The remainder of the cases cited in the opinion below each involved going, private insurance companies and are distinguishable on the first two grounds above discussed with reference to the *Andrews* case. These cases are: *Eberhard* v. *Northwestern Mutual Life Insurance Co.*, 6 Cir., 241 F. 353; *Robbins* v. *Western Automobile Insurance Co.*, 7 Cir. 4 F. 2d 249, *certiorari* denied, 268 U. S. 698; *Woods* v. *Thompson*, 7 Cir. 14 F. 2d 951; *Stur-*

geon v. *Great Lakes Steel Corp.*, 6 Cir., 143 F. 2d 819, 821. The last case, like the decision below, shows a preference for the older case of *Lion Bonding & Surety Co.* v. *Karatz*, 262 U. S. 77, (p. 821), and a reluctance to follow the more liberal and up-to-date rule of *Gibbs* v. *Buck*, 307 U. S. 66, (p. 822, 2nd column).

Size of the Class, Size of the Fund, and Nature of the Representative Plaintiff.

As to the size of the plaintiff class, the complaint describes its number as being "in excess of 100,000" and the members as being located in all parts of the United States (R. 4) but a subsequent official financial statement of defendant appearing in a Senate committee report (Appendix "B" hereof), of which this Court can take judicial notice, gives the number of policies issued by defendant as 6,551,193, not including renewals, and accordingly the number of the class has been referred to in this petition and brief as "6,000,000" in order to give the Court a more accurate approximate idea of the number. A similar approximate figure was used by us in brief and argument in the Circuit Court of Appeals without objection by defendant. No legal rights or consequences depend upon the difference between the number given in the complaint and the more accurate figure here given.

As to the size of the fund, that has been described in the complaint as about $225,000,000.00 (R. 3), which is sufficiently accurate for all present purposes, and this figure has been used for conveniences in the foregoing petition and in this brief. Actually, the defendant's officially published financial statement which is included in Appendix "B" hereof shows that as of May 31, 1947, defendant, under its "general program", which refers

to these policies, had collected in round figures $244,000,000.00 from its policyholders, had earned $10,000,000.00 interest on this fund, making total income of $254,000,000.00, had paid out administrative expense and commissions to agents of $44,000,000.00 and had paid out war damage losses to policyholders of $73,063.99, leaving a balance of about $210,000,000.00, as the actual approximate amount of the fund in controversy. See page 95.

As to the nature of this plaintiff, Matlaw Corporation, the complaint sufficiently describes it by saying "plaintiff is a representative member of this class, is able to provide and is providing adequate representation of all members of said class in this action" (R. 4, par. 8). The complaint further discloses that plaintiff paid an annual premium of $104.00 for two years, making a total contribution of $208.00 to this fund (R. 3), which is considerably in excess of the average contribution of about $35.00 by the average class member, ($210,000,000.00 divided by 6,000,000 members). These facts were undisputed below and were admitted by the motion to dismiss (R. 17). The facts were somewhat amplified in briefs and argument so the Circuit Court of Appeals was able to state in its opinion that "defendant issued one of these policies to plaintiff on its $80,000.00 building in Hammond, Indiana" (R. 78).

Petitioner believes the foregoing suffices to identify it as a typical class member, in the central part of the nation, which made a contribution substantially larger than the average class member and which is a substantial property owner, neither excessively large or excessively small. Petitioner believes this record will show that it has prosecuted and protected the rights of the class with competence, diligence, much labor and considerable expense.

Defendant has in no stage questioned the character or competence of the representation being given the class

by plaintiff but only asserts the legal proposition that a class action is not maintainable and that, if it were, the class has no claim against defendant. *Rule 23 of Civil Procedure* expressly provides that the class may be represented by "one" plaintiff. In this type of case it is desirable that one competent class representative should go forward diligently and expeditiously with the action. Nothing would be gained, but much confusion and delay would result, by increasing the number of named class representatives. Even if 6,000 named class representatives were added, they would still be only 1,000th part of the 6,000,000 class members, while on the other hand great confusion and delay would result from multiplying the class representatives, with resulting detriment to the courts, to defendant, and to the class itself.

This action was commenced August 30, 1946, within about 30 days after defendant publicly announced through the press that it intended to turn this residuary fund over to its parent, the RFC, as a "profit." In other words, this action was commenced as soon as the need for legal protection to the class became apparent. *This action is the first class representative action ever filed against defendant on behalf of this class or relating to this fund.*

Defendant has conceded of record that if a class suit is maintainable, then this is the prior and proper suit. Defendant did not question the venue or jurisdiction of the District Court for the Southern District of Indiana over its person but made a general appearance and filed a motion to dismiss the complaint (R. 15) under which it argued (1) lack of jurisdictional amount and (2) failure to state a claim on the merits (R. 79).

Subsequent Attempted Class Action By Knowles.

As above stated, the present action, filed in the District Court for the Southern District of Indiana on August 30, 1946 (R. 1) is the first action ever filed for this plaintiff

class. Subsequently, on November 7, 1946 two members of this class, Russell and Sylvia Knowles, undertook to file a similar class representative action on behalf of all members of the same class as Cause No. 37624 in the District Court of the United States for the District of Columbia against War Damage Corporation (R. 99). Defendant filed a motion to dismiss that action "because a suit for the same relief between the same parties is already pending in the United States District Court for the Southern District of Indiana," plus the further grounds of lack of jurisdictional amount and failure to state a cause of action (R. 109, par. 2). Attached to the motion to dismiss was an affidavit of defendant's counsel, stating that the present petitioner's case was duly filed on August 30, 1946 and was "begun by the appropriate filing and serving of the accompanying complaint (and) is still pending in the District Court for the Southern District of Indiana, Indianapolis Division" (R. 116). Said motion to dismiss was sustained on July 9, 1947 by an order of the District Court for the District of Columbia which, without opinion, or assigning a specific ground, recites:

> "Upon consideration of the motion of defendant to dismiss the complaint, it is by the Court, this 9th day of July, 1947, Ordered that the motion of the defendant, War Damage Corporation, to dismiss the complaint be and it is hereby granted; and that the complaint be and hereby is dismissed with prejudice. (Signed) Edward M. Curran, Justice." (R. 117).

Transcript on appeal in the *Knowles* case was filed in the Circuit Court of Appeals for the District of Columbia on October 2, 1947 and the case remains pending there undecided at the time this Petition is filed.

Defendant has properly taken the position of record in the *Knowles* case that if such a class suit can be maintained, the prior and lawful jurisdiction is in the District Court for the Southern District of Indiana in petitioner's

case (R. 109, 112, 116). Mention is made of the *Knowles* case in this brief to avoid confusion in the event the case is cited as a precedent by Respondent's brief, and also to indicate the need of having this Court review the present case to avoid potential conflict between the two circuit courts of appeals. It would present an anomalous situation if the Court of Appeals for the District of Columbia should undertake to hold defendant answerable in the subsequent attempted class action of *Knowles*, after the Seventh Circuit Court of Appeals had adjudged that this same class could not sue defendant in a Federal Court for the same fund, because of incapacity to aggregate their claims for jurisdiction. The same alleged jurisdictional infirmity exists in the *Knowles* case because *Knowles* had only a small war damage policy on a dwelling house and paid an annual premium of only $9.00 (R. 108), whereas the present Petitioner paid an annual premium of $104.00.

The Facts Should Be Viewed in the Light Most Favorable To the Plaintiff Class, as Against the Dismissal.

Should there be any lack of detailed facts in this record, this is not Petitioner's fault. The complaint was in general terms without pleading evidence, as required by the Rules of Civil Procedure, and defendant made no motion to make it more specific on any point. Moreover, when plaintiff moved to obtain more detailed information from defendant's officials and records by depositions (R. 16), defendant objected thereto (R. 19, top). The court never ruled on plaintiff's motion to take depositions but sustained defendant's motion to dismiss (R. 26), which was affirmed on appeal.

In this state of the record any doubts which might arise as to the facts should be resolved in plaintiff's

favor, and the complaint should be viewed "in the light most favorable to the plaintiff." (*Crossland* v. *Kentucky etc. Assn.*, 6 Cir. 1939, 103 F. 2d 565, par. 1). A dismissal of this kind can stand "only where it is clear and apparent to the court that the plaintiff would not be entitled to relief under any state of facts which can be proved in support of the specific claim" (*Dollar* v. *Land*, 154 F. 2d, 307, 309, par. 2, affirmed, *Land* v. *Dollar*, 67 S. Ct. 1009, 91 L. Ed. 903). Further, it must appear "to a *certainty* that plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim", before a dismissal could stand under the present rules. This was said in an insurance case where a beneficiary sought to impress a trust upon funds in the company's hands. (*Leimer* v. *State Mutual Life Insurance Co.*, 8 Cir., 1940, 108 F. 2d 302, 306, par 8).

It is not Petitioner's purpose to argue this petition on any technical grounds of procedure but merely to point out that any lack of detailed facts which might appear in this record does not occur through Petitioner's fault, but in spite of Petitioner's efforts to enlarge them by depositions and trial. These efforts (R. 16) were rebuffed and defeated by the actions of the courts below, at defendant's behest, in summarily throwing this novel and important case out of court on motion to dismiss, without any attempt to investigate the facts more fully (R. 26, 83)—a practice which this Court condemned in *Borden's Farm Products Co.* v. *Baldwin*, 293 U. S. 194, 211-213, 55 S. Ct. 187, 193, 79 L. Ed. 281.

II.

THE FEDERAL QUESTIONS.

This is an outstanding instance where this Court is called upon to exercise its broadest judicial functions in determining the intention of Congress, and the equitable

rights which flow from the statutes and from the exceptional course of events which gave rise to this class and this fund.

Chartering of Defendant.

The RFC chartered this defendant in the white heat of war excitement on December 13, 1941, six days after Pearl Harbor, giving it only the barest skeleton of corporate form and the vaguest of corporate powers and objects. The entire charter, and the resolution of the RFC's Board of Directors creating it, is annexed hereto as Appendix "A", page 85. Its corporate objects are stated as follows in clause Third of the charter:

> "To provide, *through* insurance, reinsurance *or otherwise,* reasonable *protection* against loss of or damage to property, real and personal which may result from enemy attack."

The preamble of the creating resolution states that the charter is issued "in order to expedite the national defense program." The sole source of RFC's power to charter defendant at that time was the following very vague *Section* 5d of the *Reconstruction Finance Corporation Act* which says:

> "In order to aid the Government of the United States in its *national-defense program,* the (Reconstruction Finance) Corporation is authorized • • •
>
> "(3) When requested by the Federal Loan Administrator, with the approval of the President, to *create or organize,* at any time prior to July 1, 1943, *a corporation or corporations,* with power • • •
>
> "(g) to take *such other action* as the President and the Federal Loan Administrator *may deem necessary to expedite the National-defense program,* but the aggregate amount of the funds of the Reconstruc-

tion Finance Corporation which may be outstanding at any one time for carrying out this clause (g) shall not exceed $200,000,000." (Our emphasis.)

15 U. S. C. A. 606b.

The charter makes defendant a mere puppet of RFC, having only the barest skeleton of a corporate form, to serve as one of the many arms of RFC in carrying out the national defense program. Clause Sixth of the charter requires RFC to pay in only $1,000,000 as the nominal purchase price for 1% of defendant's capital stock. This clause goes on to say that RFC shall pay for the balance of the stock "as called." But that simply means that RFC will pay for the balance of the stock (if ever) when it gets ready to *make a call on itself*, because clause Ninth says: "The affairs and business of the corporation shall be managed by a board of directors who shall be appointed by Reconstruction Finance Corporation * * *." (See Appendix "A", page 85.)

Purpose of President Roosevelt and Mr. Jesse Jones,— Press Releases.

At the outset it was the intention of President Roosevelt, and of Mr. Jesse Jones and the RFC, that defendant should serve as an emergency instrument to furnish *free* war damage protection to all property owners of the nation up to $100,000,000.00 (the amount of defendant's authorized capital). In other words, the purpose of the RFC in subscribing for defendant's capital stock and making an initial (and only) payment of $1,000,000.00 thereon, was not the investment of capital for the purpose of making a "profit" in the insurance business but to provide a fund in defendant's treasury to be used for this war program purpose.

On the very day defendant was chartered, the Federal Loan Agency, of which Mr. Jones was Administrator, issued the following press release:

Federal Loan Agency,
Washington, December 13, 1941.

Jesse Jones, Federal Loan Administrator, announced today that, with the *approval of the President,* the Reconstruction Finance Corporation has created the War Insurance Corporation, with a capital of $100,000,000, to *provide reasonable protection* against losses resulting from enemy attacks which may be sustained by owners of property in continental United States through damage to, or destruction of buildings, structures, and personal property, including goods, growing crops and orchards.

Pending completion of details, any such losses will be protected from December 13, 1941 up to a total of $100,000,000.

Accounts, bills, currency, debts, evidences of debt, money, notes, securities, paintings, and other objects of art will not be covered.

For the time being, *no premium will be charged* for this *protection,* and no declaration or reports required, unless there is a loss.

Other terms and conditions for such protection will be announced as established. No *protection* will be available to owners of property who, in the opinion of the President, are unfriendly to the United States. (Our emphasis.)

Pages 61-62 of Hearings before House Banking and Currency Committee on H. R. 6382 (S. 2198) on Feb. 2-5, 1942.

On January 5, 1942, bills were introduced in the House and Senate (H. R. 6382 and S. 2198) to give a little more statutory framework and direction to defendant, and these bills culminated in the amendment of March 27, 1942 which added Section 5g to the RFC Act. It is coded as Title 15, Sec. 606b-2 (formerly designated as section 606a-2) and reads as follows:

> "*Loans to* War Damage Corporation.—(a) The Reconstruction Finance Corporation is hereby directed to continue to *supply funds* to the War Damage Corporation, a corporation created pursuant to section 54 of this Act (606b, of this title); and the amount of notes, bonds, debentures, and other such obligations which the Reconstruction Finance Corporation is authorized to issue and to have outstanding at any one time under existing laws is hereby increased by an amount sufficient to carry out the provisions of this subsection. Such funds shall be supplied only upon the request of the Secretary of Commerce, with the approval of the President, and the aggregate amount of the *funds* so supplied shall not exceed $1,000,000,000. The Reconstruction Finance Corporation is authorized to and *shall empower* the War Damage Corporation to *use* its *funds* to provide, *through* insurance, reinsurance, *or otherwise,* reasonable *protection against* loss of or damage to property, real and personal, which may result from *enemy attack,* (including any action taken by the military, naval, or air forces of the United States in resisting enemy attack), with such general exceptions as the War Damage Corporation, with the approval of the Secretary of Commerce, may deem advisable. Such *protection* shall be made *available* through the War Damage Corporation on and after a date to be determined and published by the Secretary of Commerce which shall not be later than July 1, 1942, upon the payment of such premium *or other charge,* and subject to such terms and conditions, as the War Damage Corporation, with the approval of the Secretary of Commerce, may es-

tablish, *but, in view of the national interest involved,* the War Damage Corporation shall from time to time establish *uniform rates* for each type of property with respect to which such protection is made available, and in order to establish a *basis* for such rates, such Corporation *shall estimate the average risk of loss on all property of such type in the United States.*

* * *

"(b) Subject to the authorizations and limitations prescribed in subsection (a), *any* loss or damage to any such property sustained subsequent to december 6, 1941, and *prior to the date* determined by the Secretary of Commerce under subsection (a), may be compensated by the War Damage Corporation *without requiring a contract of insurance or the payment of premium or other charge,* and such loss or damage may be adjusted *as if a policy covering such property was in fact in force* at the time of such loss or damage." (Our emphasis.)

15 U. S. C. A. 606b-2.

On February 2, 1942, when Mr. Jones was testifying before the House Banking and Currency Committee on S. 2198 which subsequently became the above Act, he stated as follows at page 19 of the Hearings of that Committee, regarding the above quoted press release and another of the same tenor on December 22, 1941:

"They (press releases) were intended to *constitute an insurance policy.* They were * * * submitted to the President and O. K'd by the President before they were released and they were *intended to allay some of the fear of people about these bombings.*" (Our emphasis.)

The above statement of Mr. Jones shows that when he and the President spoke of "an insurance policy" they had in mind something fundamentally different from commercial policies issued by private companies (which

the Courts below unfortunately used as the test in denying jurisdiction).

Mr. Jones' statement also shows that he and the President did not conceive of defendant's *function* as a *profit-making* corporation when they created it. They conceived it as an instrumentality to "provide reasonable *protection*" to the nation's property owners, in the words of its charter, and to "allay some of the fear of the people about these bombings," in the above-quoted words of Mr. Jones to the Senate Committee.

Protective Purpose Conceived by the President Was Retained by Congress.

This basic *purpose* of defendant—to be the "protector" of the nation's property owners—as conceived by Mr. Jones and the President, never changed. It underwent one modification as to the *means* of accomplishing the purpose, at the hands of Congress, namely: Though both the House and Senate agreed that defendant should continue to give free protection until it could set up shop (July 1, 1942) and the Senate wanted to continue free insurance thereafter up to $15,000 per property, the House successfully contended that defendant should make a charge—not for the *purpose* of making a *profit* but for the purpose of having the property owners *pay the cost* of their *own protection.* This was made clear in the following statement of Mr. Steagall, chairman of the Banking and Currency Committee in explaining to the House this bill which was in his hands:

> "The House bill provides for the *assessment* of *charges,* which, of course, it is contemplated will be *enough to cover cost,* and incidental charges." (Our emphasis.)
>
> Cong. Rec., Vol. 88, No. 43, page 1903, 3rd column, March 2, 1942.

The Senate conferees (Senators Maloney, Bankhead, Radcliffe, Davaher and Taft) agreed to adopt the House version (the House conferees being Messrs. Steagall, Williams, Spence, Wolcott and Gifford).

But when Senator Maloney, in charge of the bill, explained the conference report to the Senate, he emphasized the "uniform rate" provision of the final draft which has the effect of spreading the cost uniformly over all protected property owners in the nation, and then he added:

> "One of the *principal purposes* of the amendment is to keep the rates at *low cost.*" Our emphasis.)
>
> Cong. Rec., Vol. 88, No. 56, page 2770, 2nd column, March 18, 1942.

There is nothing substantial in the records of either Senate or House to indicate a profit-making motive. In the courts below, defendant was able to cite only two isolated instances where the word "profit" occurred in debate. The context showed that in one instance the person speaking was talking about the prospect of avoiding a *loss* to the Treasury and in the other the person speaking (Congressman Maroney, not a conferee) was putting in a good word for Mr. Jones' ability by saying Mr. Jones might show a profit, but in the same breath he said: "I do not think we can all expect Uncle Sam to be big enough to pay off on damage unless property owners *help* by paying their *small fees* into the *fund.*" (Our emphasis.) Cong. Rec. Vol. 88, No. 43, page 1921, 3rd column.

Need For Judicial Construction.

Due to the haste and excitement of war which surrounded the creation of defendant, Congress failed to foresee that this fund contributed by the property own-

ers might remain almost entirely unexpended and failed to provide expressly what should be done with it in the present situation. If it be said that Congress expressed no intent to return it to the contributors, it is equally true that Congress expressed no intent to have defendant make a speculative "profit" of 22,500% on a gigantic insurance gamble with the nation's property owners and then turn this "profit" over to RFC or the Treasury.

In this situation, this Court has the high constitutional function to "divine" the intent of Congress and to declare the legal results flowing therefrom, "by a process of interpretation which, in effect, is the ascertainment of policy immanent."

Keifer v. *Reconstruction Finance Corporation*, 306 U. S. 381, 389, 59 S. Ct. 516, 518-521.

Markham v. *Cabell*, 326 U. S. 404, 409, 66 S. Ct. 193, 195.

Aids to Construction Appearing on the Face of the Act—Uniform Rate Clause—Free Protection Clause—Windfall Profit—Change of Defendant's Name.

The basic purpose of Congress, as shown by the terms of the war damage statutes and its legislative history, was to have defendant act in a parental attitude toward the nation's property owners, to quiet their fears and bolster their war morale by "providing reasonable protection" against war damage. Defendant's position toward the nation's property owners was fundamentally that of a *government-created trustee* for them.

Congress gave very loose directions and broad discretion to defendant as to the *means* of carrying out the above *purpose*. It is important to note that Congress spoke of "reasonable protection" to the nation's prop-

erty owners against war damage as being the *purpose.* It merely authorized defendant to issue "insurance" as *one* of the *alternative means* of accomplishing that object:

> "The Reconstruction Finance Corporation is authorized to and shall empower the War Damage Corporation to use its funds to provide, *through* insurance, reinsurance, *or otherwise,* reasonable *protection* against loss of or damage to property, real and personal, which may result from enemy attack. * * *" (Our emphasis)

15 U. S. C. A. 606b-2, page 52, *supra.*

The "uniform rate" provision of the Act declares that "in view of the *national interest* involved" the defendant "*shall* from time to time establish *uniform* rates" throughout the entire nation, regardless of the exposed or non-exposed location of the property. This is inconsistent with the idea of an insurance business for profit, but it is consistent with the idea of a nation-wide insurance pool to which the nation's property owners should contribute equally for mutual protection as a war measure, with Congress and the RFC setting up defendant as an instrument for that purpose.

15 U. S. C. A. 606b-2, page 53, *supra.*

The "free protection" provision of the Act is one of the strong indications against an intent by Congress to take this fund as a "profit." Congress specified that defendant should give free protection to all property owners up until the date it would start charging for protection (which was later fixed as July 1, 1942). This expressed intent to be generous to the first class of property owners, who paid nothing and did nothing to aid the Government's program, is utterly inconsistent with the theory advanced by defendant that Congress intended to turn around and be hard and niggardly and exact an enormous

"profit" from this second class of property owners who aided the Government's program by buying policies and contributing this enormous pool.

15 U. S. C. A. 606b-2, clause (b) at end of section, page 53, *supra*.

The exaction of this gigantic, speculative, windfall "profit" of 22,500% is so inequitable that the Government would not tolerate any private corporation doing it, either in the corporation's dealing with the citizens or with the Government. If a private corporation had tried to do this to the citizens in wartime, a dozen Government agencies would be investigating and prosecuting it. If the private corporation or a citizen had tried to make such a windfall profit in dealing with the Government or with a Government corporation, the Government would have invoked the re-negotiation statute to prevent it—a statute which Congress passed only a month after the above war damage Act of March 27, 1942:

Renegotiation Act of April 28, 1942, c. 247, Title IV, sec. 403, 56 Stat. 245; F. C. A. Vol. 11, Title 50, Appendix 31.

It should be presumed that on March 27, 1942, Congress intended to be as fair with the citizens to whom it was going to have this Government corporation sell protection, as it required the citizen to be to the Government corporations when, a month later, it passed the above renegotiation Act of April 28, 1942. The latter Act shows a congressional policy against windfall profits out of the war, such as defendant now tries to claim.

Congress intended that the RFC, in this instance, should adhere to its previous function of being the nation's emergency banker or money lender—not that it should be an investor or speculator in defendant's capital stock for the purpose of making a "profit" for itself or

for the Treasury out of defendant's operations. The Act says in its opening sentence that the RFC "is hereby directed to continue to *supply funds* to the War Damage Corporation." Nothing is said in the Act about RFC becoming a stockholder of defendant. That was merely part of the mechanics adopted by the RFC for the purpose of creating and controlling defendant, not for the purpose of making a stockholder's profit for itself or the Treasury.

15 U. S. C. A. 606b-2, page 52, *supra.*

Another significant circumstance is that Congress purposely deleted the word "insurance" from defendant's name "War *Insurance* Corporation" as given in its charter (page 85, *infra*). During hearings on the bill (S. 2198) before the Senate Banking and Currency Committee, a member criticized the word "insurance" in the corporate name and said it was "misleading" as to defendant's nature and function--that defendant's function really was protection—and Mr. Jesse Jones, the witness, agreed (Hearings on S. 2198, pp. 10-11). The name was changed to "War *Damage* Corporation" in that committee report (Senate Report 1012) and this was retained in the enacted bill (15 U. S. C. A. 606b-2, page 52, *supra*).

Analysis of Defendant's Arguments Below.

Various excuses offered by defendant in the courts below for keeping this fund as a "profit" might appear plausible at first blush but are unsound upon analysis, and Petitioner believes that a short analysis of them at this point may be of some convenience to the Court. Defendant argued below, among other things:

(1) That the Government and taxpayers "took the risk" of loss in this insurance business and hence the taxpayers should have the profit. This is unsound because:

(a) This supposed argument in favor of the taxpayers actually means robbing one class of taxpayers to aid the others. These 6,000,000 property owners are the largest group of taxpayers in the nation. Diverting their money from its intended special use, into the Treasury for general governmental use, simply reduces the burden of taxes and national debt for the benefit of the *other* taxpayers.

(b) In reality the Government and general taxpayers took no great risk. Congress effectively avoided this risk by the Treasury by means of the "uniform rate" provision. This gave defendant unlimited authority to fix its "premium or other charge" as high as might prove necessary "from time to time" to carry the losses, and required defendant to spread the charges evenly over the entire country, regardless of the exposed or non-exposed location:

> " * * *but, in view of the national interest involved,* the War Damage Corporation shall *from time to time* establish *uniform rates* for each type of property with respect to which such protection is made available, and, in order to establish a *basis* for such rates, such Corporation *shall* estimate the average risk of loss *on all property of such type in the United States.*"
>
> 15 U. S. C. A. 606b-2, page 53, *supra.*

This made the class so enormous and wide-spread that even heavy losses in one section could and would have been made up by the premiums contributed from other sections.

The RFC and other Government agencies effectively enlarged the class by compelling all of their thousands of large borrowers throughout the country to purchase war damage insurance from defendant, whether they wanted it or not. (R. 6).

The only real risk to the Government or the Treasury in this war damage program was that RFC might be required to "supply funds" to defendant in the nature of a temporary advance or loan to make up a temporary loss deficit until defendant could raise its rates and replenish its pool.

The regular function of RFC has been to serve as a governmental banker or credit-lender to the nation's business or property owners. Such was its function under the Act of March 27, 1942,—not to be the ultimate loser if defendant paid out substantial losses from its pool, nor to be a great speculative profiteer if defendant paid out small losses.

(2) That the class members "got what they paid for," and now the Court should hold them to their bargain. This argument is unsound because:

(a) What they paid for in reality was not a piece of paper, the policy, but the opportunity to join this great Government-sponsored pool. They were not "bargaining" freely at arm's length with a private trader, but were *trusting* their Government to treat them fairly in a strange field where the Government had a monopoly and where they were under the economic pressure of war. A more accurate statement would be that they have already "paid for what they got" and that the unused residue of their contributions should be refunded.

(b) It was impossible to fix a fair "price" for the class members to pay defendant for this protection, due to the lack of any standard to measure it, plus the haste with which Congress had to launch defendant as a war emergency measure. The program pursued by defendant was to make the rates high, to collect a vast pool of money quickly, to be ready for an emergency, to help

win the war, and to leave the equities for adjustment after the war, (which is what this class is now asking this Court to do). That was a proper war program for defendant to pursue. But it is wrong for defendant now to try to distort that situation by painting itself as a commercial insurance company which dealt at arm's length with property owners, sold them a standard commodity, "gave them what they paid for," and therefore is entitled to keep the money they paid in as a "profit".

(3) That "the successful prosecution of the war" by the Government kept the war damage losses low, and it is somewhat wrong for the class members to ask for a refund of the residue of this fund which was thereby saved. This argument is highly unfair and unsound, because:

(a) These 6,000,000 class members and their families contributed their full share of blood, taxes and bond purchases toward winning the war, along with the other citizens who are not members of this class. Their payments into this pool were *over and above* their general war sacrifices, and were for a *special* purpose. The national victory is no excuse for mis-appropriating this fund into the national Treasury.

(b) This fund has already had deducted from it the very heavy overhead expense of about $44,000,000 in order to administer and pay out $73,000 of actual losses to these class members. The class members are offering to bear this expense in full and to do full equity. They ask only the *residue* of this fund after the RFC gets back its original $1,000,000.00 stock investment, after all losses have been paid (including $617,000.00 of losses on "gift insurance" before defendant started to issue policies), and after deducting all of defendant's ex-

penses (including about $42,000,000.00 of commissions, expenses and participation paid by defendant to its several hundred "fiscal agents," the private insurance companies). See financial statement in Appendix "B" hereof, page 95, for details.

(4) That Congress "approved the rates" which defendant proposed to charge. This argument is both untrue in fact and unsound in law, because:

(a) It was predicated below on a fragment from the Congressional Record, whereas the context shows that Congress *refrained* from fixing any rates at the request of Mr. Jesse Jones. While Mr. Jones quoted some tentative rates which he and defendant "thought" would be "appropriate," and the conferees "thought the suggested rates were as reasonable as could be expected," the context shows that this was merely a casual comment, that nobody had any means of measuring what was a reasonable rate. The attention of Congress was focused, not on *specific rates,* but on the *purpose* of defendant. The basic idea expressed by both Mr. Jones and the conferees was that "since losses resulting from the war are a *national responsibility,* there should be no discrimination in rates because of a geographical location," and further that "one of the *principal objects* of the amendment is to *keep the* rates at a *low cost.*" (Our emphasis).

Congressional Record, Vol. 88, No. 56, page 2770.

(b) Even if Congress had expressly approved the proposed *rates,* that would not solve the present question of what *disposal* Congress intended to make of the residue of this *fund* after the war.

Defendant's Basic Nature is that of a Government-created Trustee for the Nation's Property Owners.

There is abundant evidence, starting with the charter, the above quoted statements of Mr. Jones concerning the concept of the President and himself, and running through the proceedings of the Senate and House into the Act itself, showing a *consistent basic purpose* that defendant should occupy a parental role in making "protection" available to the nation's property owners.

This basic purpose was essentially one of *trust,* with defendant occupying the role of a *Government-created trustee for* the nation's property owners. The trust relationship sprang almost automatically from the surrounding situation. Here were the nation's property owners, afraid and helpless. The Government's role toward the people is always protective and paternal to quite an extent, and this was accentuated by sudden war. The President and Mr. Jones conceived and created the defendant to serve, first as the free giver of protection, with the fund coming from the Treasury through the RFC as a conduit. Then Congress modified the *source* of the *fund,* so that it was to be contributed by the nation's participating property owners, uniformly, and "enough to cover cost and incidental charges." But Congress did not change the basic *trust function* of defendant. In fact, Congress accentuated it. At first, all the nation's property owners were donee-beneficiaries. Congress made them *contributing* beneficiaries. At first, defendant was to be a receptacle to hold and distribute a fund coming from the Treasury through RFC. But before any more than the initial, nominal $1,000,000 came from that source, Congress modified defendant into a receptacle to collect and distribute the property

owners' money. The President approved this modification of his original creation by signing the bill. But there is no indication that either he or Congress intended a departure from his original concept of the *trust function* of defendant.

Since Congress was working under great pressure, and since its attention was directed to the idea of only collecting "a low rate" and "enough to cover cost," it failed to foresee and make express provision for the *result* which has developed, where almost none of the fund was used to pay losses and an enormous unused residue has *resulted.*

The remedy for such an *unforseen result* to a fund is the basic equity doctrine of *resulting trust* and the closely related doctrine of *restitution.* The unique nature of the present situation makes it impossible to cite a case directly in point. The following decision of the Court of Appeals for the District of Columbia is the closest one Petitioner finds. It was held proper to bring a class representative suit against the Secretary of Agriculture, the Treasurer of the United States and other administrative officials in charge of the national cotton pool and its funds, to impress an *equitable lien* and a *resulting trust* upon the *residue of the fund.* The court said:

> "We think it clear that in this case as in *Philadelphia Co.* v. *Stimson,* 223 U. S. 605, 32 S. Ct. 340, 56 L. Ed. 570, the suit is not one in which the court is asked to interfere with the official discretion of a government officer. Its entire purpose is to challenge the authority of certain government agents to distribute improperly, as appellants claim, a *fund* in which they have an interest and in which the government has none—as it is clear, we think, that here the government has no proprietary or possessory rights in the fund. It is also clear that under the authorities we have cited the court may *impress an equitable lien* on the money and order its return

to *equitable owners.* See *Osborn* v. *Bank of United States,* 9 Wheat. 738, 6 L. Ed. 204; *German Alliance Ins. Co.* v. *Van Cleave,* 191 Ill. 400, 61 N. E. 94. * * *

"We think the suit is in the nature of an action *to impress a fund with a trust* and compel its restoration and we think it is properly brought as a class suit." (Our emphasis).

Thompson v. *Deal, et al.,* C. of A., D. C., 92 F. 2d 478, 483.

The following recent decision of this Court, though not on similar facts, lays down the applicable principle that whenever a situation develops between a property owner and federal executive officials (Maritime Commission in that case), where they hold possession of property which legally or equitably belongs to the citizen and not to the Government, he can have all the legal or equitable remedies against them to recover it.

"And where they (executive officials) unlawfully seize *or hold* a citizen's realty or chattels, recoverable by appropriate action at law *or in equity,* he is not relegated to the Court of Claims to recover a money judgment." (Our emphasis).

Land v. *Dollar,* 67 S. Ct. 1009, 1012, par. 7, 91 L. Ed. 903, 907, headnote 5.

The following recent opinion, though not involving similar facts, summarizes the broad principles of trust and equity which bear upon this case:

"'Implied trusts are more frequently defined as those which, without being express, are deducible from the *nature* of the transaction as matters of intent, *or which are superinduced upon the transaction by operation of law* as matters of equity, *independently* of the *particular intention* of the parties.' 65 C. J. Sec. 12, p. 221.

"'* * * the *jurisdiction of equity in all cases of trusts,* express or implied, resulting or constructive, is unquestioned * * *' 21 C. J. Sec. 93, p. 116.

"As was stated in Pomeroy in his Equity Jurisdiction, 2d Ed. Vol. 1, Sec. 151: 'The doctrine of trusts became and continues to be the *most efficient instrument* in the hands of a chancellor for *maintaining justice,* good faith, and good conscience.'

"*Clews* v. *Jamieson,* 182 U. S. 461, 479, 21 S. Ct. 845, 852, 45 L. Ed. 1183, cited with approval the doctrine of trusts as enunciated by Pomeroy: '*All possible trusts,* whether express or implied, are within the *jurisdiction* of the chancellor. * * * The remedies which such a court may give depend upon the nature and object of the trust; sometimes they are specific in their character, and of a kind which the law courts cannot administer, but often they are of the same general kind as those obtained in legal actions, being mere recoveries of money. A court of equity will always, by its decree, declare the rights, interest or estate of the cestui que trust, and will compel the trustee to do all the specific acts required of him by the terms of the trust. * * * This remedy the courts of equity will always decree when necessary, whether it is confined to the payment of a single specific sum or *involves an accounting* by the trustee for *all that he has done* in pursuance of the trust, and the *distribution* of the trust moneys among all the beneficiaries who are entitled to share therein. 1 Pom. Eq. Jur., Sec. 158.'" (Our emphasis.)

Reed v. *Kellerman* (1941), D.C. E.D. Pa. (Judge Kalodner) 40 F. Supp. 46, 50, pars. 7-9.

The following decision of this Court states the well known principle that equity raises a *resulting trust* in favor of the grantor where property has been conveyed to an organization which later dissolves, so that it becomes apparent that the property, or the unused residue of the property, will never be used for the purpose contemplated. This case was where a grantor conveyed land in fee to trustees for the use of an unincorporated association (which was formed by written articles of association), the land to be used by the association for

the purpose of a burial ground for the members. The land was thus held and used for a number of years, after which the bodies were removed by the public authorities and the association became dissolved. The question was, who was entitled to keep the land? The trustees who held legal title to it or the heirs of the grantor? This Court held that a *resulting trust* arose in favor of the grantor's heirs, saying:

> "In the case at bar, the trust created by the deed having been terminated, according to its express provisions, by the land *ceasing to be used* as a burial ground, and the *dissolution* and extinction of the society for whose benefit the grant was made, there arises, by a *familiar principle of equity* jurisprudence, a *resulting trust* to the grantor and his heirs, *whether* his conveyance was by way of gift, *or for valuable consideration.* 2 Foubl. Eq. 116, 133, and notes; 2 Story, Eq. Jur., Sec. 1199, 1200; Hill, Trustees, 113, 133; *Easterbrooks* v. *Tillinghast and Reed* v. *Stouffer,* above cited." (Our emphasis.)
>
> *Hopkins* v. *Grimshaw,* 1897, 165 U. S. 348, 355, 17 S. Ct. 401, 406, 41 L. Ed. 739, 743.

Closely related to the above trust doctrines, is the basic equity principle of putting the parties back in *status quo* whenever their deal takes an unexpected turn, without the fault of either side, so that one party is left holding the other party's property or money under such circumstances that he ought not *in good conscience* to keep it. This is simply another statement of the same basic equity doctrine which underlies the above trust rule about restoring a fund to the contributors. It is sometimes called the doctrine of "Restitution" and, as the Court knows, it applies in a wide variety of situations—whenever one party holds another's money or property under such circumstances that he should, in good conscience, *restore* it, or the residue of it, to the other:

"The word 'restitution' was used in the earlier common law to denote the return or restoration of a specific thing or condition. In modern legal usage, its meaning has frequently been extended to include not only the restoration or giving back of something to its rightful owner, but also compensation, reimbursement, indemnification, or reparation for benefits derived from, or for loss or injury caused to, another. The phrase *'unjust enrichment'* is used in law to characterize the result or effect of a failure to make restitution of or for property or benefits received under such circumstances as to give rise to a legal or equitable obligation to account therefor.

"It is a *general* principle, *underlying* various legal doctrines and remedies, that one person should not be permitted unjustly to enrich himself at the expense of another, but should be required to make *restitution* of or for property or benefits received, retained, or appropriated, where it is just and *equitable* that such restitution be made, and where such action involves no violation or frustration of law or opposition to public policy, either directly or indirectly. As expressed by some authorities, the obligation to do justice rests upon *all* persons, natural and artificial; if one obtains the money or property of others without authority, the law, *independently of express contract,* will compel restitution or compensation. The rule requiring restitution has in many instances been held applicable to public bodies and *governmental agencies,* as well as to private individuals and corporations, although its application in such cases is generally somewhat more restricted. It is not essential, in order to create the obligation to make restitution for benefits, that the recipient should himself have been guilty of any tortious conduct or fault." (Our emphasis).

46 Am. Jur., Restitution and Unjust Enrichment, page 99.

The Federal Judicial Power is Ample to Declare and Enforce This Trust.

True, the above cases, except *Thompson* v. *Deal*, 92 F. 2d 478, are not closely in point on the facts here, nor will any case be found closely in point with this extraordinary state of facts. However, we think the *principles* of the above authorities on the basic equity doctrines of resulting trusts and restitution, are applicable. *The original function of equity courts was precisely to meet such situations*, where the technical legal rules did not cover the situation and where, as here, the holder of property was trying to keep it unjustly by technical arguments based on *form* rather than substance and justice. Though present day courts are less frequently called upon to work out and apply basic equity principles and relief, their equity powers are just as broad as those of the early courts, when a unique case like this does come before them. Ever since the original Judicial Code of 1789, the law has provided that:

> "The district courts shall have jurisdiction, as follows: First. O*f all* suits of a civil nature at common law or in *equity*" (where there exists the other requirements of amount, and diversity of citizenship or federal question).
>
> Judicial Code, sec. 24; 28 U. S. C. A. 41 (1).

More fundamental than the above section of the Judicial Code are the following sections of the Constitution:

> "*The Judicial Power* of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. * * *" (Our emphasis).
>
> Constitution, Article III, sec. 1.

> "The judicial Power shall extend to *all* Cases, in Law *and Equity*, arising under this Constitution,

the Laws of the United States, and Treaties made, or which shall be made, under their Authority. * * *" (Our emphasis).

Constitution, Article III, sec. 2.

It is interesting to note that the Constitution makes a broader grant of power to the Judicial than to the Legislative department. Article I, section 1 vests in Congress only the legislative powers "herein granted". These are enumerated in section 8, at the end of which is added power "to make all laws necessary and proper for carrying into execution" the expressly granted powers. But the grant of power to the Judicial Department is *general* and *unlimited,* the language of section 2, above quoted, being not a limitation or enumeration but a declaration as to the subjects mentioned, which leaves unrestricted "the general grant of the entire judicial power" contained in section 1.

Kansas v. *Colorado,* 206 U. S. 46, 27 Sup. Ct. 655, 661.

Moreover, the public interest involved in the present case should authorize the fullest exercise of the Judicial Department's equity powers and remedies:

"It is a familiar doctrine that the *extent* to which a court of equity may grant or withhold its aid, and the *manner of moulding its remedies,* may be affected by the *public interest* involved." (Our emphasis).

United States v. *Morgan,* 307 U. S. 183, 194 59 S. Ct. 795, 801, par. 9.

The same remedies exist against defendant as against a private litigant. Its charter gives it power "to sue and be sued in any court of competent jurisdiction," (clause Third, page 86, *infra*), and such is the law generally as established by this Court relative to the RFC and its subsidiaries:

Keifer v. *Reconstruction Finance Corporation* (1939), 306 U. S. 381, 390-396; 9 S. Ct. 516, 518-521.

Reconstruction Finance Corporation v. *I. G. Menihan Corporation* (1941), 312 U. S. 81, 83-85; 61 S. Ct. 485, 486-487.

Sovereign immunity is not here involved and defendant made no such contention in either of the courts below.

Land v. *Dollar*, 67 S. Ct. 1009, 1011-1012, 91 L. Ed. 903, 905-906.

III.

THE CONSTITUTIONAL QUESTIONS.

If it be determined that Petitioner's construction of the Act and the purpose of Congress, as urged in the foregoing proposition II, is correct, then the present constitutional questions become moot.

But if it be determined that one of the primary objects for which Congress created defendant was to make a profit for the Government, either directly or through the RFC as a conduit, then Petitioner urges that this object was unconstitutional and void. If that object was void, the result will be the same as if Congress had intended the right thing. The unconstitutional object (to take this residuary fund as a profit) failing, equity will restore the fund to its contributors under the doctrines of resulting trust and restitution discussed under the preceding proposition II.

"The Government may carry on its operations • • • through corporate forms especially created for defined ends." But the primary object of the corporation must be "for carrying into execution" the expressly granted

powers. Profit-making for the Government cannot be the primary object or one of the primary objects.

Federal Crop Insurance Corporation v. *Merrill*, 68 S. Ct., 1, 3, 92 L. Ed. 51, 53.

M'Culloch v. *Maryland*, 4 Wheat. (17 U. S.) 314, 407-411, 4 L. Ed. 579, 602.

Granting that a Government corporation can make an "incidental profit" in connection with carrying out its primary legitimate functions, the actual situation now presented to this Court makes it impossible to treat this residuary fund as an incidental profit (where the major part of the fund collected by the corporation for a special purpose remains unused in its hands and the purpose has disappeared, so that the so-called "incidental" profit would be about 225 times the capital investment or 22,500%.

In a case of this kind, the constitutional test must always be applied to the *existing situation*, not on a basis of what "*might* have happened." The latter has been the main excuse offered by defendant in the courts below for keeping this fund as a profit. Such argument is very dangerous, particularly in a case of this kind, because it would offer the temptation, and open the door, for these great Government corporations to depart from their basic and legitimate constitutional function of furnishing services and *protection* to the people and would let them become *traders* with the people for *profit*. This would be detrimental to the people, to private business, and most serious of all, it would be an insiduous and dangerous encroachment by these governmental instrumentalities into fields beyond their proper boundaries.

This is the type of case where it is particularly urgent for this Court to look through form and technicality and be alert to the *actual situation*:

> "It is an established principle that the attainment of a *prohibited end* may not be accomplished under the *pretext* of the exertion of powers which are granted." (Our emphasis.)
>
> *United States* v. *Butler,* 297 U. S. 1, 68-69; 56 S. Ct. 312, 320, par. 13, 80 L. Ed. 477.

The profit motive is repugnant to the lofty protective motives for which the President and Congress created defendant. See pages 50-55, and 64-65, *supra.*

The RFC has successfully urged, and the courts have held, that it is "a corporation *not engaged in business for profit* with the attendant *motive* oftentimes found to take advantage of those with whom it deals." This paternal and broadly fiduciary role has been used by the RFC and the courts as a ground for giving it important *privileges* in dealing with the people and the business concerns of the nation:

> "It also should not be overlooked that RFC was a corporation *not engaged in business for profit* with the attendant *motive* oftentimes found to take advantage of those with whom it deals. On the other hand, it was an agency created by the government for the *sole purpose,* as far as we are aware, of *rendering assistance* by the use of government funds to those in financial need, not only for their benefit and protection but for the welfare of the country as a whole."
>
> *Todd v. Maryland Casualty Co.,* 7 Cir., 155 F. 2d 29, 38, par. 7.

The war emergency furnished the *occasion* for the exercise of congressional power by creating defendant to perform the function of furnishing "protection" to the nation's property owners. But the emergency could not en-

dow Congress with any *new power* to create a profit-making corporation.

Defendant's war function repels the idea that it had a profit-making function. Its war function strengthens our contention that its actual function (and the only one it could legitimately have) was to serve as an instrument to make possible a co-operative effort by the nation's property owners—to furnish a receptacle in which the Government invited them to pool their money for mutual protection, whereby they would pay in enough of their own money "to cover cost and incidental charges" of their own protection—to guard the Treasury against loss but not to make a profit for the Treasury:

> "Thus, the war power of the federal government is not created by the emergency of war, but it is a power given to meet that emergency. It is a power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a *supreme co-operative effort* to preserve the nation." (Our emphasis).
>
> *Home Building & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 426; 54 S. Ct. 231, 235, 2d column; 78 L. Ed. 413.

Before defendant can justify its withholding of this fund from the contributors, and justify its asserted intention of turning it over to the RFC or the Treasury, it must show a constitutional grant of power, express or incidental, so to do:

> "Every acquisition, *holding,* or disposition of property by the Federal Government depends upon *proper* exercise of a constitutional *grant of power.*" (Our emphasis).
>
> *United States* v. *Allegheny County,* 322 U. S. 174, 182; 64 S. Ct. 908, 913, par. 1.

The Act of July 30, 1947.

An unusual supplemental question exists, which in Petitioner's opiinion does not affect this Petition, but which it considœrs should be called briefly to this Court's attention:

While this case was pending in the Seventh Circuit Court of Appeals, Congress inserted, and passed on July 30, 1947, a clause in the Government Corporations Appropriation Act of 1948, *which attempted to oust the jurisdiction of that court and to decide the very law question then pending before the court,* by legislative fiat. The clause is under Title II of the Act and reads:

> "'Federal Loan Agency
>
> War Damage Corporation: The Board of Directors of the Corporation shall pay or cause to be paid to the Treasury of the United States $210,751,618.65 of the amount realized by the Corporation from its operations, such sum to be covered into the Treasury immediately upon the approval of this Act and applied to reduction of the national debt."
>
> The Government Corporations Appropriation Act, 1948 (Public Law 268, 80th Cong., 1st Sess., Chap. 358), under Title II.

The above clause seems to have first appeared in the bill (H. R. 3756) as reported on June 9, 1947 by the House Committee on Appropriations (House Report 544, 80th Cong. 1st Sess., p. 6) but apparently the first hearing conducted on this clause was when the bill subsequently came before the Sub-committee of the Senate Committee on Appropriations, headed by Senator Homer Ferguson, who conducted the hearing on June 24, 1947. A copy of the testimony and exhibits on this subject at that hearing is appended hereto as Appendix "B", from

which it appears that defendant's Chairman, Mr. J. D. Goodloe, and the RFC's general counsel, Mr. John L. Dougherty testified at the hearing and *fully advised* Senator Ferguson and the Sub-committee, both orally and by letter, *that this case was then pending* in the Seventh Circuit Court of Appeals *and that the question before that court* was whether defendant owned this fund or whether it was a trust fund equitably belonging to these class members. (Hearings, pp. 86, 92-93; Appendix "B", pp. 90, 97-99).

It also appears from that hearing (Appendix "B" hereof), that Senator Ferguson stated at the beginning of the discussion:

> "*I* tried to get a bill through to *return* it (this $210,000,000.00 balance in defendant's hands) *to the people who paid it in*, but the RFC objected to it." (Our emphasis). (Hearings, p. 86; Appendix "B", p. 90).

But near the close of the discussion, without citing any reason for the change of attitude and without giving any excuse for attempting to oust the court's jurisdiction, Senator Ferguson said:

> "*Let the suits go.* I do not want you to hold the money out for the suits. We could provide for them in another way and require you to turn over the money on June 30, 1947, after paying your then-established debts." (Our emphasis). (Hearings, p. 93; Appendix "B", p. 99).

The apparent reason for this change of attitude and for the Sub-committee recommending this legislation is the following statement of Senator Ferguson near the close of the discussion:

> "The people want part of their (national) debt paid. *Here* is some $210,000,000.00 which could be used for *that* purpose." (Our emphasis). (Hearings, p. 93; Appendix "B", p. 100).

Having in mind the current historical fact that a political issue then existed in Congress, where the majority faction was urging reduction of taxes and reduction of the national debt by all possible means, it is apparent from the record of that Hearing that the intent of inserting the above clause in the Act (which was quite foreign to the body of the Act dealing with appropriations) was to by-pass the Circuit Court of Appeals and frustrate a judicial decision of this case, by means of a legislative decision of the very subject matter and the very law question which was pending before the court. By the same token the potential jurisdiction of this Court to review this important case was likewise attempted to be cut off.

A month before the above committee hearing of June 24, 1947, the Circuit Court of Appeals' jurisdiction had attached by the filing of the transcript of this case on May 26 (R. 37) and the general appearance of the Attorney General for the appellee, War Damage Corporation, on June 2, 1947 (R. 38).

Upon learning of the passage of the above statute, plaintiff filed a petition for a restraining order in the Circuit Court of Appeals on August 28, 1947 to restrain defendant from paying over this fund to the Treasury (R. 38-45), which was answered by defendant (R. 46). Attached to defendant's answer was the affidavit of its president stating that he received notice of plaintiff's application for restraining order on the same day it was filed, August 28, (R. 52, middle), but that the next day, August 29, he went ahead and transmitted this fund by check to the Treasury (R. 50) and further, that "my action in signing the letters of transmittal was neither accelerated nor delayed by any notice that I received * * *." His affidavit states that he conceived it to be his duty to comply with the statute, though he gives no reason for treating his obligation to Congress on a higher plane than

his obligation to the Circuit Court of Appeals (R. 52, middle). On September 4, 1947 the Circuit Court of Appeals denied the petition for temporary restraining order without opinion and without assigning grounds (R. 65). However, at the subsequent oral argument on October 9, 1947 (R. 76) the court orally indicated that it considered a restraining order unnecessary in view of this Court's holding that one having notice of a pending suit acts at his peril of the outcome, even though he be not enjoined—in *Jones* v. *Securities and Exchange Comm.*, 298 U. S. 1, 15-16, quoted at page 83 *infra*.

On September 5, 1947, plaintiff filed another petition in the Circuit Court of Appeals to make the Commissioner of Accounts of the Treasury, and the Treasurer, ancillary parties appellee so that they could be restrained from cashing the check that had just been transmitted to them by defendant as above stated (R. 65-71). Actual notice of the filing of this petition was given to said officials on the filing date, September 5, 1947 (R. 67). They filed an answer under special appearance on September 15 (R. 72). Appended to their answer was the affidavit of the Commissioner of Accounts of the Treasury showing that on September 12 while that petition was pending, he had purportedly cashed the check without waiting for the court to act on the petition (R. 74). Subsequently, on September 18, 1947 the court denied said petition (R. 75).

This purported transfer of funds was little more than a bookkeeping entry, because defendant had this fund on deposit in the Treasury. The check transmitted to the Treasury was described in the transmittal letter as "a check drawn on the Treasury of the United States" (R. 50). So no outside financial institution or bank was involved, and apparently all that was done was to make a bookkeeping entry transferring the fund out of defendant's or the RFC's deposit account, like a bank depositor giving his bank a check payable to the bank.

It should be noted that defendant did not contend below that Congress had any power to oust the jurisdiction of the court, but confined its answer to the petition for restraining order to a contention that the appeal was without merit. The answer impliedly admits that the court would have power to issue the restraining order if convinced that the Act of July 30, 1947 was "presumptively unconstitutional" (R. 47, middle).

Denial of such emergency relief does not foreclose the rights of either side on the merits, on final hearing:

> *Brown* v. *Quinlan, Inc.*, 7 Cir. 138 F. 2d 228, 229, par. 4.

And if defendant or the officials in question did acts relying upon such a ruling they did so "at their peril," of the final decision:

> *City of Tampa* v. *Texas Co.*, 5 Cir., 89 F. 2d 221, 222.

Neither did the Circuit Court of Appeals treat this attempted transfer of funds as ousting its jurisdiction. It went ahead and discussed and decided the case on the merits precisely as it would have done, had this event not occurred, and without mentioning it in the opinion (R. 77-82). This plainly implies that the court did not consider the question moot and did not consider its jurisdiction affected by the Act of July 30, 1947.

Petitioner calls attention to this unusual and serious attempt of Congress to oust the Court's jurisdiction, but does not deem it necessary to elaborate the law on this important and interesting question at length in this brief. Petitioner believes it is self-evident that this Court will not abdicate the jurisdiction and functions it otherwise would have in this case, and particularly not at this stage. Upon final briefing and argument, this question can be elaborated more at length if necessary.

It suffices now to say that this attempt by Congress to seize this $210,000,000.00 fund which is actually in equity the *property* of these 6,000,000 citizens, and to apply it on the national debt violates that part of the *Fifth Amendment,* which reads:

> "Nor shall private property be taken for public use, without just compensation."

It also violates the rule which stems from the above Constitutional provision—that when a citizen has acquired a property right under a previous law, he cannot be deprived of it by the Executive Department acting under authority of a later law, or an unconstitutional law:

Land v. *Dollar,* 67 S. Ct. 1009, 1011-1012, 91 L. Ed. 903, 905-906.

United States v. *Norton,* D. C. Fla., 14 F. (2d) 184, 186-187.

United States v. *Carolene Products Co.,* D. C. Ill., 7 F. Supp. 500, 507, pars. 5 and 6.

Ickes, Secretary of Interior v. *Fox,* 1937, 300 U. S. 82, 96-97, 57 S. Ct. 412, 417, pars. 8-1, 81 L. Ed. 525.

United States v. *Lee,* 1882, 106 U. S. 196, 1 S. Ct. 240, 251-261, 27 L. Ed. 171 (leading case).

Philadelphia Co. v. *Stimson, Secretary of War,* 1912, 223 U. S. 605, 619-620, 56 L. Ed. 570, 576-577, 32 S. Ct. 340, 344.

Lane, Secretary of Interior v. Watts, 1914, 235 U. S. 525, 540, 58 L. Ed. 1440, 1456, 34 S. Ct. 965, 972.

Stafford v. *Wallace, Secretary of Agriculture,* 1922, 258 U. S. 495, 512, 42 S. Ct. 397, 400.

Still more serious from a constitutional standpoint is this attempt by the legislative branch of the Government to dispose of *property* which was *then* in litigation before the Federal Court and to *decide the very question before*

the Court by legislative fiat, namely; that the fund belongs to the defendant instead of the class plaintiffs.

The following authorities hold that the lower federal courts derive their judicial power from the Constitution as much as the Supreme Court, and that neither the legislative nor the executive branch or any governmental agency can withdraw the subject matter of a pending case from a federal court or infringe the rights of litigants before the court:

Payne v. *Griffin,* D. C. Ga. 1943, 51 F. Supp. 588, 591-593.

Benson v. *Crowell,* S. D. Ala. 1929, 33 F. (2d) 137, 139, par. 1.

Humphrey's Exr. v. *United States,* 1935, 295 U. S. 602, 629-630, 55 S. Ct. 869, 874, par. 6, 79 L. Ed. 611.

This action of Congress strikes at the very roots of the Constitution and would make the constitution founders turn over in their graves. However, from a practical standpoint, this error by Congress will probably correct itself almost automatically in the event this Court upholds its jurisdiction and goes forward with the case. It can be assumed that the Treasurer of the United States will respect this Court's jurisdiction by holding the money intact and subject to the Court's final mandate. (*Miguel* v. *McCarl, Comptroller General,* 291 U. S. 442, 455-456). It is commonplace for federal courts to issue their mandates and directives to officers of the executive branch. In fact, this is the only way the court has of getting its decisions executed. While mandates commonly go to the marshals, who are executive officers, they are not limited to such officers. The mechanics of restoring the *status quo* of this fund are a *supplemental matter* which the Court has ample power to work out after its final decision on the merits. The continuing power of this Court over the subject matter of the case and its power to enforce

its final decision by such mandate is in no way diminished by the fact the court below did not grant our request for temporary emergency relief by issuing a temporary injunction. Such orders are always discretionary and their denial does not prejudice the final decision of the case. (*Brown* v. *Quinlan, Inc.*, 7 Cir., 138 F. 2d 228, 229, p. 4; *City of Tampa* v. *Texas Co.*, 5 Cir., 89 F. 2d 221, 222, *supra*).

Moreover, this Court, at the behest of a governmental agency, recently laid down the following rule:

> "The rule is well settled, both by the courts of England and of this country, that where a suit is brought to enjoin certain acts or activities, for example, the erection of a building, or other structure, of which suit the *defendant has notice, the hands of the defendant are effectively tied* pending a hearing and determination, *even though no restraining order* or preliminary injunction be issued. We briefly review some of the decisions.
>
> • • •
>
> "The conclusion to be drawn from all the cases is that after a defendant has been *notified* of the pendency of a suit *seeking* an injunction against him, *even though a temporary injunction be not granted, he acts at his peril* and *subject to the power of the court to restore the status, wholly irrespective of the merits* as they may be ultimately decided." (Our emphasis).
>
> *Jones* v. *Securities & Exchange Comm.*, (1936), 298 U. S. 1, 15-16, 17-18; 56 S. Ct. 654, 657, 658, pars. 2 and 3.

Therefore, it is respectfully submitted that the Petition for Certiorari should be granted.

JAMES E. WATSON,
ORIN DEM. WALKER,
WALTER MYERS, JR.,
JAY E. DARLINGTON,
Attorneys for Petitioner.

APPENDIX "A".

Resolved, That in order to expedite the national-defense program, Reconstruction Finance Corporation, as requested by the Federal Loan Administrator with the approval of the President of the United States, pursuant to Section 5d of the Reconstruction Finance Corporation Act, as amended, does hereby issue the following charter:

"Charter of War Insurance Corporation

In order to expedite the national-defense program and for the purpose of creating a corporation with the powers hereinafter stated pursuant to authority contained in Section 5d of the Reconstruction Finance Corporation Act, as amended, the creation of such corporation having been requested by the Federal Loan Administrator with the approval of the President, the Reconstruction Finance Corporation does hereby create a corporation and declares that:

First: The name of the corporation shall be War Insurance Corporation.

Second: The location of the principal office of the corporation shall be in the City of Washington, District of Columbia.

Third: The objects, purposes and powers of the corporation shall be:

To provide, through insurance, reinsurance or otherwise, reasonable protection against loss of or damage to property, real and personal, which may result from enemy attack.

The corporation shall have power to do all things incidental to the foregoing and necessary or appropriate in connection therewith including, but not limited to, the power to borrow and hypothecate, to invest and reinvest its funds, to adopt and use a corporate seal, to make contracts, to acquire, hold and dispose of real and personal property necessary and incidental to the conduct of its business, and to sue and be sued in any court of competent jurisdiction.

Fourth: The corporation, including its franchise, its capital, reserves, surplus, and income, shall be exempt from all taxation (which shall, for all purposes, be deemed to include sales, use, storage, and purchase taxes) now or hereafter imposed by the United States, or any territory, dependency or possession thereof, or by any state, county, municipality or local taxing authority, except that any real property (or buildings which are considered by the laws of any state to be personal property for taxation purposes) of the corporation shall be subject to state, territorial, county, municipal or local taxation to the same extent according to its value as other real property is taxed.

Fifth: The corporation shall be an instrumentality of the United States Government, shall be entitled to the free use of the United States mails, and shall in all other respects be possessed of the privileges and immunities that are conferred upon the Reconstruction Finance Corporation under

the Reconstruction Finance Corporation Act, as amended.

Sixth: The total authorized capital stock of the corporation shall be One Hundred Million Dollars ($100,000,000), of which One Million Dollars ($1,000,000) shall be paid in immediately, and the balance as called. Such stock shall be of one class, shall have a par value of $1000 per share, and shall be issued for cash only. Reconstruction Finance Corporation shall subscribe for all of the capital stock of the corporation and such stock shall not be transferable.

Seventh: The corporation shall not have succession beyond January 22, 1947, except for purposes of liquidation, unless it is extended beyond such date pursuant to an Act of Congress.

Eighth: The stockholder shall not be liable for the debts, contracts, or engagements of the corporation except to the extent of the unpaid stock subscriptions.

Ninth: The affairs and business of the corporation shall be managed by a board of directors who shall be appointed by Reconstruction Finance Corporation pursuant to the provisions of this Charter and the By-Laws of the corporation.

Tenth: This Charter and the By-Laws may be Amended at any time by Reconstruction Finance Corporation.

In Witness Whereof, Reconstruction Finance Corporation has caused this Charter to be signed by its executive officer, the Chairman of its Board of Directors, and attested by its Acting Secretary, and has caused its seal to be hereunto affixed this day of December, 1941.

RECONSTRUCTION FINANCE CORPORATION

By .....

Chairman

Attest:

.....

Acting Secretary."

APPENDIX "B".

Consisting of excerpts from pages 85-87, 89-93 of Senate Hearing on Act of July 30, 1947, Public Law 268, H. R. 3756, before Subcommittee of the Committee on Appropriations, United States Senate, 80th Congress, first session, hearing of June 24, 1947.

Boldface has been used to emphasize parts of text, as an aid in locating pertinent parts in the prolix text and financial statement.

"Statements of John L. Dougherty, General Counsel Reconstruction Finance Corporation; and J. D. Goodloe, Chairman, War Damage Corporation, Washington, D. C.

Mr. DOUGHERTY. Mr. Chairman, we are here today because of an error which crept into H. R. 3756, page 16, lines 12 to 17, where provision is made for turning into the general fund of the Treasury $210,751,618.65.

That is everything that War Damage Corporation had as of April 30, 1947. There was a letter that was sent to Mr. Taber over in the House and they did say that there was attached a balance sheet and operating statement of the War Damage Corporation as of April 30, 1947, and you will observe from the summary that the excess of income over expenses amounted to $210,751,-618.65, which is the sum we contemplate turning over to the Treasury in due course.

BILL TO RETURN INSURANCE PREMIUMS TO PEOPLE

Senator Ferguson. The trouble is with the "due course." I tried to get a bill through to return it to the people who paid it in but the RFC objected to it.

Mr. Dougherty. The RFC does not object to the bill or to turning it back.

The reason you received the letter was that we had been sued in Indianapolis and here in the District and the manufacturers in those suits asked that that be a trust fund and held for the benefit of those who contributed to it.

Senator Ferguson. The bill, of course, would have taken care of that.

Mr. Dougherty. That is right.

We think as far as Congress is concerned, that they could direct us.

Senator Ferguson. Why should we not put it in here?

Mr. Dougherty. Because we think that should be limited to $208,000,000, as Mr. Goodloe stated to you.

Senator Ferguson. What do you want to do with the other?

PENDING SUITS FOR DAMAGES

Mr. Dougherty. We have pending a couple of suits.

Senator Ferguson. You know how we take care of judgments. We appropriate money to take care of them.

Mr. Dougherty. We are paying some claims that have been approved. This takes every dime, and there is not even the money to pay the expenses during the liquidation period.

Senator Ferguson. This is cash.

Mr. Dougherty. But we do not have any money to pay the expenses.

Senator Ferguson. What do you need to liquidate? The way to liquidate cash is to turn it over, and then there is nothing else to do.

Mr. Dougherty. We do not quarrel with that, but we do believe we ought to have enough to pay the pending claims.

Senator Ferguson. The Government can pay the pending claims. Persons can present them, and the Treasury will pay them.

Mr. Dougherty. The present law provides for that.

Senator Ferguson. **But we are changing**, is that not what we are doing?

LIQUIDATION OF WAR DAMAGE CORPORATION.

Mr. Dougherty. Another way would have to be developed for liquidating the War Damage Corporation as provided in the law. This makes for no provision for its liquidation.

Senator Ferguson. We found that the Wood Corporation in 1918 has been continued up to date. That was the Spruce Production Corporation, and they have been going and going and going. You cannot liquidate these corporations unless you do it this way: Take all their money and then they have to liquidate.

Mr. Dougherty. This corporation goes into liquidation on June 30.

PAY ROLL OF WAR DAMAGE CORPORATION.

Senator Ferguson. For instance, how much of a pay roll has the Government had on this Corporation? How much pay roll, and how much rent, and how much in expenses?

Mr. Dougherty. Hardly any.

Senator Ferguson. How much?

Mr. Dougherty. I cannot answer that exactly but it **has operated with personnel of the Reconstruction Finance Corporation.**

Senator Ferguson. You want us to leave in your hands $2,000,000?

Mr. Dougherty. Until such time as the claims have been paid and that would go into the general fund of the Treasury.

Senator Ferguson. Yes; but how much will it cost the Government for you to have $2,000,000? If we let you have $2,000,000 how much will you want a year to operate?

Mr. Dougherty. **It is practically nothing.**

Mr. Goodloe. I do not think there is one that is giving full time. I suppose I give the largest proportion of time in comparison to anybody. **I do not suppose there is a Government corporation that is operated on as small an expense.**

Senator Ferguson. How much will you use for pay roll?

Mr. Dougherty. **There is nobody on the pay roll of the War Damage Corporation.**

Senator Ferguson. Why should we allow this $2,000,000 when we can apply it on our debt and save interest?

Mr. Dougherty. Because we have claims pending now some of which will be approved within the next week, $46,000.

• • •

Senator Ferguson. I know that. This statement is already in.

Mr. Dougherty. They did not exclude the reserves.

Senator Ferguson. I will make it a part of the record.

(The financial statement is as follows:)

Statement of condition of War Damage Corporation as at the close of business May 31, 1947

ASSETS

Cash:		
On deposit with Reconstruction Finance Corporation	$231,046,508.15	
Funds held by fiduciary agents	3,841.56	
		$231,050,349.71
Accounts receivable		9,481.22
Accrued interest receivable from Reconstruction Finance Corporation, net		934,790.73
Equipment declared surplus		150.67
Subscription to capital stock		99,000,000.00
Total		330,994,772.33

LIABILITIES AND CAPITAL

Accounts payable:		
To Reconstruction Finance Corporation	$51,835.30	
To others	71,730.09	
		$123,565.39
Liability to fiduciary agents for funds held in WDC accounts pending final audit		3,841.56
Participants' interest payable:		
To participants in general program	$19,925,000.00	
To participants in money and securities program	91,384.92	
		20,016,384.92
Suspended credits		5,864.83
Receipts not allocated pending advices from fiduciary agents		446.57
		20,150,103.27
Capital stock:		
Authorized	$100,000,000.00	
Unissued	99,000,000.00	
Issued		1,000,000.00
Subscribed		99,000,000.00
Reserves for settlement of claims:		
On general program	$ 50,000.00	
On prepolicy program	2,000,000.00	
		2,050,000.00
Surplus		208,794,669.06
Total		330,994,772.33

Memorandum

	Insurance coverage	Number of policies issued	Number of renewal certificates
General program, Mar. 31, 1944	$114,017,194,000	6,551,193	2,202,538
Money and securities, Sept. 30, 1944	3,003,081,000	4,719	.....
Glass reinsurance, Mar. 15, 1943	58,717,355	.....	.....
Total	117,078,992,355	6,555,912	2,202,538

War Damage Corporation—Income and expense from organization to and including May 31, 1947

	Cumulative June 30, 1946	Fiscal year 1947	Cumulative through May 31, 1947
Income			
Premiums collected less returned premiums	$246,040,818.48	.....	$246,040,818.48
Interest earned (net)	7,687,977.89	$2,105,298.88	9,793,276.77
Miscellaneous income	629.88	1,106.07	1,735.95
Total	253,729,426.25	2,106,404.95	255,835,831.20

Expense:			
Producers' commissions	16,278,991.08	.....	16,278,991.08
Fiduciary agents' expense, reimbursable	5,445,650.08	.....	5,445,650.08
Administrative expense	1,997,561.40	380,923.48	2,379,484.88
Nonadministrative expense	17,893.21	20,961.28	38,854.49
Claims paid	443,482.03	247,335.16	690,817.19
Loss investigation expense	107,692.40	19,607.78	127,300.18
Provision for payment to participants	20,030,236.60	827.64	20,031,064.24
	44,321,506.80	669,655.34	44,991,162.14
Excess of income over expense	209,407,919.45	1,436,749.61	210,844,669.06

GENERAL PROGRAM

Income:			
Premiums collected less returned premiums	$244,910,495.95	.....	$244,910,495.95
Interest earned	7,667,669.27	$2,101,571.97	9,769,241.24
Miscellaneous income	629.88	1,070.11	1,699.99
Total	252,578,795.10	2,102,642.08	254,681,437.18
Expense:			
Producers' commissions	16,229,491.35	.....	16,229,491.35
Fiduciary agents expense, reimbursable	5,404,255.44	.....	5,404,255.44
Administrative expense	1,935,515.12	380,490.71	2,316,005.83
Nonadministrative expense	14,748.93	2,071.01	16,819.94
Claims paid	73,063.99	.....	73,063.99
Loss investigation expense	10,104.18	114.95	10,219.13
Provision for payment to participants	19,925,000.00	.....	19,925,000.00
Total	43,592,179.01	382,676.67	43,974,855.68
Excess of income over expense	208,986,616.09	1,719,965.41	210,706,581.50

MONEY AND SECURITIES PROGRAM

Income:			
Premiums collected less returned premiums	$983,529.16	.....	$983,529.16
Interest earned	26,602.70	$8,330.33	34,933.03
Miscellaneous income	.....	35.96	35.96
Total	1,010,131.86	8,366.29	1,018,498.15
Expense:			
Producers' commissions	49,499.73	.....	49,499.73
Fiduciary agents' expense reimbursable	41,394.64	.....	41,394.64
Administrative expense	13,520.42	.....	13,520.42
Nonadministrative expense	144.28	90.00	234.28
Provision for payment to participants	90,557.28	827.64	91,384.92
Total	195,116.35	917.64	196,033.99
Excess of income over expense	815,015.51	7,448.65	822,464.16

GLASS REINSURANCE PROGRAM

Income:			
Premiums on glass reinsurance	$146,793.37	.....	$146,793.37
Interest earned	4,731.11	$1,257.80	5,988.91
Total	151,524.48	1,257.80	152,782.28

	Cumulative June 30, 1946	Fiscal year 1947	Cumulative through May 31, 1947
Expense:			
Administrative expense	$107.48	.....	$107.48
Paid to participants in gross reinsurance program	14,679.32	.....	14,679.32
Total	14,786.80	.....	14,786.80
Excess of income over expense	136,737.68	1,257.80	137,995.48
Excess of income over expense, policy programs	209,938,369.28	1,728,671.86	211,667,041.14
ON COVERAGE GRANTED PRIOR TO JULY 1, 1942			
Expense:			
Administrative expense	$48,418.38	$432.77	$48,851.15
Nonadministrative expense	3,000.00	18,800.27	21,800.27
Claims paid	370,418.04	247,335.16	617,753.20
Loss investigation expense	97,588.22	19,492.83	117,081.05
Interest expense	11,025.19	5,861.22	16,886.41
Excess of expense	530,449.83	291,922.25	822,372.08
Excess of income over expense, all programs	209,407,919.45	1,436,749.61	210,844,669.06

War Damage Corporation—Claims, May 31, 1947

	Cumulative June 30, 1946		Fiscal year 1947		Cumulative through May 31, 1947	
	Number	Amount	Number	Amount	Number	Amount
General program:						
Claims for losses, gross	620	$199,943.05	(4)	$6,531.15	[1]616	$206,474.19
Less:						
Claims wholly denied or withdrawn	209	73,818.07	63	32,596.49	[2]272	106,414.56
Amount of reduction in claims	....	15,909.52	..	.....	...	15,909.52
Claims paid	279	73,063.99	..	.....	279	73,063.99
	488	162,791.58	63	32,596.49	551	195,388.07
Claims in process of adjustment	132	37,151.46	(67)	(26,065.34)	[3]65	11,086.12
On coverage granted prior to July 1, 1942:						
Claims for losses, gross	2,129	177,429,043.14	296	86,711.05	2,425	177,515,754.19
Less: Philippine claims reversed	611	172,822,514.62	10	13,995.93	621	172,836,510.55
	1,518	4,606,528.52	286	72,715.12	[4]1,804	4,679,243.64
Less:						
Claims wholly denied or withdrawn	156	2,751,947.25	145	15,068.75	[5]301	2,767,016.01
Amount of reduction in claims	....	121,895.11	..	9,147.91	...	131,043.02
Claims paid	637	370,418.04	816	247,335.16	1,453	617,753.20
	793	3,244,260.40	961	271,551.83	1,754	3,515,812.23
Claims in process of adjustment	725	1,362,268.12	(675)	(198,836.71)	[6]50	1,163,431.41

[1] Includes 180 claims recorded at a nominal value of $1.
[2] Includes 140 claims recorded at a nominal value of $1.
[3] Includes 40 claims recorded at a nominal value of $1.
[4] Includes 158 claims recorded at a nominal value of $1.
[5] Includes 131 claims recorded at a nominal value of $1.
[6] Includes 27 claims recorded at a nominal value of $1.

Mr. Dougherty. I would also like to make a part of the record Mr. Goodloe's letter to you, Senator.

Senator Ferguson. Yes, I want that in.

(The letter is as follows:)

June 16, 1947.

Hon. Homer Ferguson,

Chairman, Government Corporations Subcommittee of the Committee on Appropriations,
United States Senate, Washington, D. C.

Dear Senator Ferguson: Reference is made to the provision of H. R. 3756 requiring War Damage Corporation to pay into the Treasury of the United States the sum of $210,751,618.65.

The sum mentioned represents the excess of this Corporation's income, over expenses incurred, as of April 30, 1947. Coverage of such sum into the Treasury of the United States would disable this Corporation from continuing to meet out of the proceeds of its insurance program the necessary expenses of completing that program and auditing the accounts of the Corporation's agents.

Enactment of H. R. 3756 in its present form would also make it impossible for this Corporation to pay out of the profits of the insurance program claims now in process of adjustment or any judgments which may hereafter be rendered against the Corporation.

There are now pending against War Damage Corporation four suits, brought, respectively, by **Matlaw Corp.**, Russell and Sylvia Knowles, Matson Navigation Co., and Schmidt & Ault Paper Co.

The first two suits mentioned above were brought by the named plaintiffs in **behalf of themselves and all other former policyholders** of the Corporation and seek to re-

quire that the excess of premiums collected by War Damage Corporation, over and above losses and expenses, be refunded to policyholders. The third suit seeks recovery for a marine loss in the amount of $820,000. The fourth suit mentioned seeks recovery against War Damage Corporation under a policy of insurance in the amount of $6,371.15.

In the *Matlaw* v. *War Damage Corporation* case, the complaint has been dismissed by the District Court of the United States for the Southern District of Indiana for lack of jurisdiction and an appeal has been noted by the plaintiffs. In the suit of *Knowles* v. *War Damage Corporation*, in addition to the prayers for relief contained in the *Matlaw* case, the plaintiffs seek an injunction restraining this Corporation from disbursing the fund which plaintiffs seek to have declared a trust fund for the benefit of policyholders. That case has recently been argued before the District Court of the United States for the District of Columbia, and the court has taken the matter under advisement. The plaintiffs are, in effect, therefore, seeking to prevent the entire surplus from being covered into the Treasury.

In case, notwithstanding the pendency of the suits above referred to, the Congress shall deem it advisable that a sum substantially equal to the profits of War Damage Corporation from its insurance program shall be forthwith covered into the Treasury of the United States, the Corporation should be permitted to retain sufficient funds to meet the necessary expenses of completing the insurance program and auditing the accounts of the Corporation's agents and to pay valid claims. It is estimated that approximately $2,7[illegible] will provide an adequate reserve for these purp[illegible] ccordingly, it is recommended that the amount w[illegible]n the War Damage Cor-

poration is directed to pay into the Treasury at this time should not be in excess of $208,000,000.

The foregoing information was transmitted to the Honorable John Taber, chairman of the House Committee on Appropriations, by letter dated June 11, 1947. Unfortunately, our letter was received too late to afford an opportunity for consideration of this problem by the House of Representatives.

With kind personal regards,

Sincerely yours,

John D. Goodloe, *Chairman.*

AVAILABLE FUNDS AS OF JUNE 30, 1947.

Senator Ferguson. I want you to figure up how much money you will have on the 30th of June.

Mr. Dougherty. There is a suit pending which Mr. Goodloe mentions in his letter, and in one suit they are claiming $820,000; that is a boat that was torpedoed, and there is a suit now. There is another one for $6,371, in addition to these other ones.

Senator Ferguson. **Let the suits go. I do not want you to hold the money out for the suits.** We could provide for them in another way and require you to turn over the money on June 30, 1947, after paying your then-established debts.

Mr. Goodloe. As to that, I think that might work out very properly; but there is this element—that the auditing of the affairs and accounting of the insurance companies that have acted as agents for War Damage Corporation and have done the principal work of receiving policies and issuing policies and investigating claims—that auditing has not been completed. I am told it will

probably be completed except as to one group of companies by the end of the calendar year, December 31.

Senator Ferguson. **The people want part of their debt paid. Here is some $210,000,000 which could be used for that purpose.**

AUDITS OF INSURANCE COMPANIES.

What is the virtue of continuing these audits?

Mr. Goodloe. Because we do not know whether our money has been accounted for. Maybe some of these companies owe us money.

Mr. Dougherty. In conjunction with this plan, the War Damage Corporation used the facilities of the existing insurance companies of the Nation when the paid-for insurance was placed and premium-paying insurance was placed, and that is the reason we never have had a large staff.

We never wrote a dime's worth of insurance; it was written by the insurance companies all over the country.

Senator Ferguson. I understand.

Mr. Dougherty. They were to be compensated at the rate of 10 per-cent of the net, or in no event more than $20,000,000; 10 percent of the net will be $20,000,000, because there is that much net, but before we make a disbursement to them of their share of this fund they must submit to an audit. Most of those audits have been completed.

Mr. Goodloe. All except the home group, which has not kept proper auditing accounts.

Senator Ferguson. Do you think any money would be coming to us—to the Government?

Mr. Dougherty. What we wanted you to do now, as Mr. Goodloe indicated in his letter, was that he would like to have the $210,000,000 changed to $208,000,000 leaving an adequate balance.

Senator Ferguson. That is what we want to avoid, because you can go a long way on $2,000,000, and we will have you in existence years.

Mr. Goodloe. Why not adopt that June 30 arrangement?

Senator Ferguson. We will try to work some language out since we now understand your picture.

Mr. Dougherty. Thank you, sir.

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 624

MATLAW CORPORATION, PETITIONER

v.

WAR DAMAGE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for the Southern District of Indiana (R. 21–26) is reported at 7 F. R. D. 349. The opinion of the Circuit Court of Appeals for the Seventh Circuit (R. 77–82) is reported at 164 F. 2d 281.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on October 29, 1947 (R. 83), and a petition for rehearing was denied on December 9, 1947 (R. 121). The petition for a writ of cer-

tiorari was filed on February 25, 1948. The jurisdiction of this Court is apparently invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (cf. Pet. 4).

QUESTION PRESENTED

Whether the courts below erred in holding that petitioner was not a claimant in a true class suit and accordingly could not aggregate the claims of those similarly situated in order to satisfy the $3,000 jurisdictional requirement of Section 24 (1) of the Judicial Code.

STATUTES INVOLVED

The pertinent portions of the statutes involved are set forth in the Appendix, *infra,* pp. 14–16.

STATEMENT

The respondent, War Damage Corporation, was created on December 13, 1941, by the Federal Loan Administrator, with the approval of the President, pursuant to Section 5d of the Reconstruction Finance Corporation Act (Act of January 22, 1932, c. 8, 47 Stat. 5, as amended (15 U. S. C. 606b)); its powers were defined subsequently by Section 5g of the Act of March 27, 1942, 56 Stat. 175 (15 U. S. C., Supp. V, 606b–2) (Appendix, *infra,* pp. 14–16), further amending the Reconstruction Finance Corporation Act (R. 21–22, 77). Respondent's charter purpose was to provide insurance coverage for damage to prop-

erty by enemy attack (R. 7, 22, 77).[1] Its authorized capital stock was $100,000,000, all of which was subscribed for by the Reconstruction Finance Corporation and was non-transferable (R. 22, 78). Prior to July 1, 1942, respondent provided war damage insurance without cost (R. 22, 77). Thereafter, in accordance with Section 5g of the Act (Appendix, *infra*, pp. 14–16), this insurance was made available to all property owners who desired it upon the payment of annual premiums (R. 22, 78). On November 30, 1942, respondent issued a policy to petitioner for which the latter paid a premium of $104 and a second premium of $104 on November 30, 1943 (R. 3–4, 22–23, 78).[2]

Respondent began dissolution proceedings shortly after the termination of hostilities (R. 22). Because covered losses were relatively few, it ceased operations with a sum of money in excess of $225,000,000, of which only a small percentage was required for the payment of current expenses and outstanding claims (R. 3, 22). On August 30, 1946, petitioner instituted this suit as a class action under Rule 23, F. R. Civ. P. (R. 1). The complaint alleged that jurisdiction was

[1] Article 3 of the charter (Pet. 85) provided in part: "The objects, purposes and powers of the corporation shall be: To provide, through insurance, reinsurance or otherwise, reasonable protection against loss of or damage to property, real and personal, which may result from enemy attack. * * *"

[2] Insurance was issued through fiduciary agents which included any insurance carrier specifically appointed by respondent (R. 3, 22, 78).

based on the fact that the matter in controversy exceeded $3,000 and arose under the Constitution and laws of the United States (R. 1–2); that respondent held as "net premiums" a sum exceeding $225,000,000 (R. 3);[3] and that petitioner had paid respondent annual premiums in the sum of $208 (R. 3–4). It prayed, *inter alia*, that the court require respondent to distribute its profits among former policy holders, in proportion to the premiums paid by them, on the ground that these profits were held by respondent "as trustee for the common pro rata benefit of all said policy holders" (R. 4).[4] Respondent filed a motion to dismiss the complaint, asserting that the court was without jurisdiction in that this was not a true class suit and that therefore the jurisdictional amount was not present since petitioner's individual interest totaled at the most only $208 (R. 15, 23).[5]

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[3] Respondent showed a net profit in excess of $209,827,810.45 on its operations to July 30, 1947 (R. 50).

[4] Petitioner's second claim requested the court to require respondent to return to policy holders the second annual premium which it alleged had "needlessly increased [the] fund by more than $100,000,000" (R. 5). Its third claim requested the court to require respondent to distribute their share of profits to those policy holders who were required to purchase insurance by the R. F. C. and other government instrumentalities under the terms of mortgages, loans, contracts, and other arrangements (R. 6).

[5] The Government also urged (R. 79) that petitioner has failed to state a cause of action because: (1) in defining the functions of the War Damage Corporation in Section 5g of the Reconstruction Finance Corporation Act, it was clearly

The district court dismissed the complaint for want of jurisdiction on the ground that since petitioner was asserting merely an individual right this was not a true class action, and, accordingly, petitioner could not aggregate the claims of other policy holders in order to achieve the $3,000 minimum required by Section 24 (1) of the Judicial Code (R. 23–26). Petitioner thereupon appealed (R. 27). Pending this appeal, and on July 30, 1947, the Government Corporations Appropriation Act, 1948 was enacted (Pub. Law 268, c. 358, 80th Cong., 1st sess., Appendix, *infra*, p. 16). By this statute, respondent was directed to pay immediately into the Treasury of the United States the surplus funds which had accrued, to be applied to the reduction of the national debt. On August 29, 1947, respondent transferred the sum of $209,827,810.45 to the Treasury of the United States (R. 50).[6] On

the intention of Congress that the surplus funds should not be distributed to the policyholders, but should be retained by the United States, and (2) the War Damage Corporation was, at least, a stock insurance corporation and its surplus belongs to the stockholders—the United States. Cf. *Cherry Cotton Mills* v. *United States*, 327 U. S. 536.

[6] Petitioner's motion for a temporary restraining order and preliminary injunction restraining the transfer (R. 40–44) was denied by the court below on September 4, 1947 (R. 65). Petitioner's motion to make the Treasurer of the United States and the Commissioner of Accounts ancillary parties-appellee and to restrain them from cashing the check and applying the amount to the national debt (R. 68–70) was denied by the court below on September 18, 1947 (R. 75).

appeal, the court below affirmed the judgment of the district court (R. 83).

ARGUMENT

The single issue posed in the instant case is whether the sum in controversy satisfies the $3,000 minimum prescribed by Section 24 (1) of the Judicial Code. Both courts below, correctly we submit, held that it did not and that the complaint should be dismissed for lack of jurisdiction. See *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583, 588–589; *Andrews* v. *Equitable Life Assurance Society*, 124 F. 2d 788, 790–791 (C. C. A. 7), certiorari denied, 316 U. S. 682; *Sturgeon* v. *Great Lakes Steel Corp.*, 143 F. 2d 819, 821 (C. C. A. 6), certiorari denied, 323 U. S. 779. Petitioner also urges a number of constitutional and statutory questions which this case does not reach (Pet. 5–14, 15–32, 33–83). But, even assuming *arguendo* that the jurisdictional amount be present, it is clear that there were no constitutional barriers to the creation of the War Damage Corporation, and that Congress specifically intended that any profits which might accrue from its operation would inure to the benefit of the Government.

1. Original federal jurisdiction, except under special acts, none of which is here involved, exists "* * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000 and (a) arises under the Constitution or laws of the United States * * *."

Judicial Code § 24 (1), as amended (28 U. S. C. 41 (1)). Petitioner attempts to ground the jurisdiction of this Court on that statute (Pet. 16–18, 33–48). Although its own claim is something less than $208, petitioner asserts that the jurisdictional minimum is achieved by aggregating the claims of those alleged to be "class members" (R. 4). But petitioner's claim is an individual one based on its contract of insurance, and an individual claim, based on contract, may not be transmuted to a class claim. See *Pinel* v. *Pinel,* 240 U. S. 594, 596; *Lion Bonding Co.* v. *Karatz,* 262 U. S. 77, 86; *Clark* v. *Paul Gray, Inc.,* 306 U. S. 583, 588; *Woods* v. *Thompson,* 14 F. 2d 951, 952 (C. C. A. 7); *Illinois Bankers' Life Association* v. *Farris,* 21 F. 2d 1014 (C. C. A. 7), certiorari denied, 276 U. S. 621; *Andrews* v. *Equitable Life Assurance Soc.,* 124 F. 2d 788, 790–791 (C. C. A. 7), certiorari denied, 316 U. S. 682; *Sturgeon* v. *Great Lakes Steel Corp.,* 143 F. 2d 819, 821 (C. C. A. 6), certiorari denied, 323 U. S. 779; *Knowles* v. *War Damage Corporation,* Civ. No. 37624 (D. D. C.); 2 Moore, *Federal Practice,* 2235–2245. Cf. *Equitable Life Assurance Soc.* v. *Brown,* 213 U. S. 25, 46–47; *Gibbs* v. *Buck,* 307 U. S. 66, 72–75; *Grand Rapids Furniture Co.* v. *Grand Rapids F. Co.,* 127 F. 2d 245, 250–251 (C. C. A. 7); *Pentland* v. *Dravo Corporation,* 152 F. 2d 851, 852–853 (C. C. A. 3). The decision below is, we submit, clearly correct.

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Petitioner relies heavily upon and asserts a conflict with *Thompson* v. *Deal*, 92 F. 2d 478 (App. D. C.) in urging that the courts below erred in holding that the present action is not a true class suit (Pet. 35–36, 41, 70). That case arose after the repeal of the Bankhead Cotton Control Act and was to recover monies paid by certain cotton producers to government agents pursuant to the repealed Act. This money, however, was a private fund and the government agents were mere custodians. It is clear, however, that the *Thompson* case is not in point. In the first place, the claimant's individual interest in the fund was in excess of the jurisdictional amount required by Section 24 (1) of the Judicial Code (92 F. 2d at 481). Moreover, that suit, instituted as a class action, partook somewhat of the nature of an action by a stockholder to protect a corporate right. It was directed against a private fund in which the United States had no pecuniary interest, and which allegedly had been deposited under duress pursuant to an agreement whereby the government agents were designated trustees. In the instant case the jurisdictional amount is not present, no trust exists, and petitioner's rights, such as they may be, are derived from its insurance policy which is a contract. We submit accordingly that no conflict exists.

2. The court below, disposing of the case on the jurisdictional issue, did not reach the merits. The petition for certiorari nevertheless seeks review

of both the jurisdictional and substantive questions involved in the suit. While we doubt whether the latter questions may appropriately be reviewed by this Court at this stage of the litigation, we submit that they do not present any grounds for certiorari. Petitioner's chief complaint on the merits appears to be that, since the anticipated enemy attacks did not materialize and the actual losses did not approach anticipated losses, it somehow has an equitable interest in the net profits which respondent earned. It seeks to support its position by reliance upon the legislative history of Section 5g of the Reconstruction Finance Corporation Act (Appendix, *infra*, pp. 14–16) which, it asserts, demonstrates that Congress never intended that any profits which might accrue from respondent's operations would revert to the United States (Pet. 48–72). We submit that such an argument is wholly without substance. Neither Section 5g nor the regulations promulgated by respondent governing the issuance of war damage insurance policies [7] contains any provision from which it might be inferred that the policyholders would have any claim to respondent's profits. Moreover, the legislative history of Section 5g clearly demonstrates a congressional intent that any surplus which might accrue be paid to the United States

[7] Regulations, July 1, 1942, and amendments (11 Fed. Reg. 177A–459 at 476; R. 7–13).

Treasury.[8] Any doubt entertained concerning the legislative intent is dispelled by the Government Corporations Appropriation Act, 1948 (Pub. Law 268, 80th Cong., (Appendix, *infra*, p. 16) which specifically commanded respondent to turn its profits over immediately to the Treasury of the United States in order to reduce the national debt. It is a familiar rule of statutory construction that subsequent legislation relating to the same subject matter may be considered by the Court in determining legislative intent. See *Great Northern Ry. Co.* v. *United States,* 315 U. S. 262, 277; *Weedin* v. *Chin Bow,* 274 U. S. 657, 667; *Bowling* v. *United States,* 233 U. S. 528, 535–536.

3. Petitioner's argument appears to proceed on

[8] Respondent was created in order to allay the widespread fears of enemy bombing, and because of the fact that private insurance companies could not carry this type of risk. Senate Report No. 1012, 77th Cong., 2d Sess., pp. 2–3. The debates which preceded the enactment of Section 5g of the Reconstruction Finance Corporation Act (Appendix, *infra*, pp. 14–16) clearly indicate a Congressional intent that the Corporation be run in a business-like manner, issuing insurance policies for reasonable premiums at rates approved by Congress, and that any profit the Corporation might make would accrue to the United States, just as any loss would be borne by the United States. House Report No. 1907, 77th Cong., 2d Sess., pp. 2, 5; Hearings before the Committee on Banking and Currency, Senate, on S. 2198, 77th Cong., 2d Sess., pp. 91–92; 88 Cong. Rec. 958–959, 1851, 1865, 2653–2654, 2658–2660. Nowhere was it suggested that any profits might be returned to policyholders.

the theory that the United States cannot constitutionally engage in a business venture "to make a profit for the Government * * *" (Pet. 72); that the Congressional mandate to transfer respondent's excess funds to the Treasury deprived petitioner and those similarly situated of their property in contravention of the Fifth Amendment (Pet. 81), and "would make the constitution founders turn over in their graves." (Pet. 82.) The constitutional power to provide for the creation of the War Damage Corporation is clear. See *Hirabayashi* v. *United States,* 320 U. S. 81, 93; *Federal Land Bank* v. *Bismarck Lumber Co.,* 314 U. S. 95, 102; *Pittman* v. *Home Owners' Loan Corp.,* 308 U. S. 21, 32–33. Further, petitioner's contention to the effect that the retention of profits by the Government would be unconstitutional would siphon from the Treasury all surpluses resulting from the various activities of a business and economic nature conducted by the many governmental corporations (See *Keifer & Keifer* v. *R. F. C.,* 306 U. S. 381, 390) and other agencies (See Lilienthal and Marquis, *The Conduct of Business Enterprises by the Federal Government,* 54 Harv. L. Rev. 545 (1941)). No one has yet suggested that, in order to proceed within constitutional bounds, the United States must be run as a gigantic eleemosynary organization.

The short of petitioner's case is that it purchased protection from respondent. Having re-

ceived the protection it paid for, it cannot now ask for the return of the purchase price.[9]

[9] There can be no question that at the very least respondent was created and operated as a corporate entity similar to any private corporation. *U. S. Shipping Board Merchant Fleet Corporation* v. *Harwood*, 281 U. S. 519; *United States ex rel. Skinner & Eddy Corporation* v. *McCarl*, 275 U. S. 1. See *Reconstruction Finance Corporation* v. *Central Republic Trust Co.*, 17 F. Supp. 263 (N. D. Ill.), affirmed *sub. nom. Reconstruction Finance Corporation* v. *McCormick*, 102 F. (2d) 305 (C. C. A. 7), certiorari denied 308 U. S. 558. Under well settled principles of commercial law the profits and surpluses in a stock insurance company belong to the stockholders and the policyholders have no interest therein. *Ohio Farmers Indemnity Co.* v. *Commissioner*, 108 F. (2d) 665, 667 (C. C. A. 6); *Hutchins Mutual Insurance Company of District of Columbia* v. *Hazen*, 105 F. (2d) 53 (App. D. C.). Petitioner attempts to argue, on the authority of *dicta* in *Federal Crop Insurance Corp.* v. *Merrill*, 332 U. S. 380, that these principles are not applicable to a government insurance program (Pet. 37, 73). It is clear, however, that the *Merrill* case is not in point. Moreover, petitioner, having accepted a policy with a stated premium cannot now object that the rate charged was too high. An insurance company can charge any premium it sees fit by express contract or agreement. One accepting the benefits of a policy under a definite contract cannot raise the question as to whether the rates charged were unreasonable or exorbitant. Appleman, *Insurance Law and Practice* (Kansas City, 1944), Vol. 14, Sec. 7843. These principles are merely the application of general contract law to contracts of insurance. See *Mobile Co.* v. *London and Lancashire Insurance Co., Ltd.*, 27 Ala. App. 384, 173 So. 99 (1937), in which the court nonsuited a plaintiff insured seeking to recover allegedly excessive premiums.

CONCLUSION

The decision below is clearly correct, and no conflict exists. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1948.

APPENDIX

1. Section 5g of the Reconstruction Finance Corporation Act, Act of March 27, 1942, 56 Stat. 175 (15 U. S. C. 606b–2) provides:

> (a) The Reconstruction Finance Corporation is hereby directed to continue to supply funds to the War Damage Corporation, a corporation created pursuant to section 5d of this Act; and the amount of notes, bonds, debentures, and other such obligations which the Reconstruction Finance Corporation is authorized to issue and to have outstanding at any one time under existing law is hereby increased by an amount sufficient to carry out the provisions of this subsection. Such funds shall be supplied only upon the request of the Secretary of Commerce, with the approval of the President, and the aggregate amount of the funds so supplied shall not exceed $1,000,000,000. The Reconstruction Finance Corporation is authorized to and shall empower the War Damage Corporation to use its funds to provide, through insurance, reinsurance, or otherwise, reasonable protection against loss of or damage to property, real and personal, which may result from enemy attack (including any action taken by the military, naval, or air forces of the United States in resisting enemy attack), with such general exceptions as the War Damage Corporation, with the approval of the Secretary of Commerce, may deem advisable. Such protection shall be made available through the War Dam-

age Corporation on and after a date to be determined and published by the Secretary of Commerce which shall not be later than July 1, 1942, upon the payment of such premium or other charge, and subject to such terms and conditions, as the War Damage Corporation, with the approval of the Secretary of Commerce, may establish, but, in view of the national interest involved, the War Damage Corporation shall from time to time establish uniform rates for each type of property with respect to which such protection is made available, and, in order to establish a basis for such rates, such Corporation shall estimate the average risk of loss on all property of such type in the United States. Such protection shall be applicable only (1) to such property situated in the United States (including the several States and the District of Columbia), the Philippine Islands, the Canal Zone, the Territories and possessions of the United States, and in such other places as may be determined by the President to be under the dominion and control of the United States, (2) to such property in transit between any points located in any of the foregoing, and (3) to all bridges between the United States and Canada and between the United States and Mexico: *Provided,* That such protection shall not be applicable after the date determined by the Secretary of Commerce under this subsection to property in transit upon which the United States Maritime Commission is authorized to provide marine war-risk insurance. The War Damage Corporation, with the approval of the Secretary of Commerce, may suspend, restrict, or otherwise limit such protection in any area to the extent that it may determine to be necessary or

advisable in consideration of the loss of control over such area by the United States making it impossible or impracticable to provide such protection in such area.

(b) Subject to the authorizations and limitations prescribed in subsection (a), any loss or damage to any such property sustained subsequent to December 6, 1941, and prior to the date determined by the Secretary of Commerce under subsection (a), may be compensated by the War Damage Corporation without requiring a contract of insurance or the payment of premium or other charge, and such loss or damage may be adjusted as if a policy covering such property was in fact in force at the time of such loss or damage.

2. The Government Corporations Appropriation Act, 1948 (Pub. Law 268, 80th Cong., 1st sess., c. 358), provides in part:

FEDERAL LOAN AGENCY

War Damage Corporation: The Board of Directors of the Corporation shall pay or cause to be paid to the Treasury of the United States $210,751,618.65 of the amount realized by the Corporation from its operations, such sums to be covered into the Treasury immediately upon the approval of this Act and applied to reduction of the national debt.

U. S. GOVERNMENT PRINTING OFFICE: 1948